ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 22 OF 2007

BETWEEN:

ANTIGUA COMMERCIAL BANK

Intended Appellant/Respondent

and

LOUISE MARTIN
(as widow and executrix of the estate of Alexis Martin, deceased)

Intended Respondent/Applicant

Before:

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

Appearances:

Sir Clare Roberts, QC, for the Appellant/Respondent
Ms. C. Debra Burnette for the Respondent/Applicant

2007: December, 3
2008: January 15.

Civil Procedure – CPR 2000, rule 62.10 - Procedural Appeal – Appeal from interlocutory order - whether leave to appeal is required – section 31(2)(g) of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act

In April 1997, Mrs. Martin, the respondent/applicant, instituted the substantive claim in this case against the Bank seeking various declaratory and other relief, as well as damages. The pleading process commenced under the Supreme Court Rules, 1970, which were repealed and replaced by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR 2000). The pleadings were filed and a number of procedural disputes were

determined under the 1970 and 2000 rules, respectively. On 8th January 2007 default judgment was entered against the Bank in favour of Mrs. Martin. The Bank applied to the High Court to set aside the default judgment, but a judge of the court dismissed the Bank's application on 13th August, 2007. The Bank thereupon filed a notice of appeal against the judgment. This was a procedural appeal under sub-rules 62.1(2) and 62.10 of CPR 2000. Mrs. Martin applied for an order dismissing the Bank's notice of appeal on the ground that it is a nullity because the Bank did not first apply for leave to appeal.

Held – allowing the application, striking out the notice of appeal and awarding costs to the applicant, Mrs. Martin, against the Bank:

(1) While no leave is required where the order or judgment appealed against is a final order or judgment, leave is required to appeal against an interlocutory order or judgment. The test by which to determine whether an order is interlocutory or final is the application test. An order is interlocutory which is made on an application which would not necessarily bring an end to the proceedings, whichever way the decision on it is made.

Othneil Sylvester v Satrohan Singh St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 followed.

(2) Under the provisions of sub-rules 62.1(2) and 62.10 of CPR 2000, which must be read with section 31(2)(g) of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act, and the application test, the Bank's notice of appeal was not only a procedural appeal but also an appeal from an interlocutory judgment or order because a judgment in default of appearance, or in default of defence, lacks finality so long as it is liable to be set aside. The order which the High Court made on the application to set aside the judgment in default of defence therefore lacked finality.

White v Brunton [1984] 2 All ER 606 distinguished; Vehicles and Supplies Ltd. et al v Financial Institutions Services Ltd. [2005] UKPC 24 applied; Jn. Marie and Sons Ltd. and Another v Jamie St. Louis, St. Lucia Civil Appeal No. 14 of 2006 (16th April 2007) explained.

(3) The Bank required leave to appeal against that judgment in which the judge refused to set aside the default judgment against it. Since the Bank failed to apply for leave, the appeal was struck out as a nullity.

Maria Hughes v The Attorney General of Antigua and Barbuda, Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004); Nevis Island Administration v La Coppropretе Du Navire, St. Kitts and Nevis Civil Appeal No. 7 of 2005 (29th December 2005), followed.

JUDGMENT

[1] RAWLINS, J.A.: On 20th August 2007, the Bank, the intended appellant in these proceedings, filed a notice of appeal against a judgment that Thomas J delivered on 13th August 2007. In that judgment, the learned judge dismissed an application by the Bank to set aside judgment in default of defence which was entered against the Bank in the substantive claim in the High Court. The learned judge also ordered the Bank to pay $2,500.00 costs to Mrs. Louise Martin, the intended respondent in these appeal proceedings. Mrs. Martin applied for an order dismissing the Bank's notice of appeal, on the ground that it is a nullity because the Bank did not first apply for leave to appeal.

[2] It is trite principle that where an appellant who requires leave to appeal fails to apply for leave, the appeal would be struck out as a nullity. This is exemplified, for example, in decisions by this court in Pirate Cove Resorts Limited and Another v Euphemia Stephens and Others[1]; Maria Hughes v The Attorney General of Antigua and Barbuda;[2] Astian Group Limited and Another v TNK Industrial Holdings Limited,[3] Nevis Island Administration v La Coppropretе Du Navire J31 and Others[4] and Jn. Marie and Sons Ltd. and Another v Jamie St. Louis.[5]

[1] St. Vincent and the Grenadines Civil Appeal No. 11 of 2002 (2003).
[2] Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004.).
[3] British Virgin Islands Civil Appeal No. 22 of 2003 (7th June 2004).
[4] St. Kitts and Nevis Civil Appeal No. 7 of 2005 (29th December 2005).
[5] St. Lucia Civil Appeal No. 14 of 2006 (16th April 2007).

[3] It is common ground that the Bank's appeal is a procedural appeal. The central issue, therefore, is whether the intended appellant requires leave to appeal. This question will be considered against a brief background.

Background

[4] Mrs. Martin, the claimant in the substantive claim against the Bank, is the widow of Alexis Martin who disappeared at sea on 10th March 1988. By a High Court order dated 11th July 1995, he was presumed to have died between 10th and 11th March 1988.

[5] In her claim, Mrs. Martin alleged that in 1985 the Bank loaned $200,000.00 to her husband and his mother to complete the construction of a dwelling house at Marble Hill. Mr. Martin was the registered proprietor of the property. The Bank executed a legal charge on the property on 11th December 1985 at 16% interest per annum to secure the loan, which was to be repaid by monthly installments. Mr. Martin was required to insure the house and to assign the insurance policy to the Bank.

[6] Mrs. Martin further alleged that following representations that were made to the Bank on her behalf in 1988, the Bank promised her that it would recover the principal amount of the loan only. She (Mrs. Martin) thereupon made several payments on the loan. She also requested information from the Bank concerning the outstanding balance on the account, the amortization schedule and the total sum which Mr. Martin had repaid on the loan. The Bank refused to provide that information on the ground that at that time she had not been appointed executrix of her husband's estate. According to Mrs. Martin, contrary to its promise, the Bank continued to add interest to the loan principal after March 1988. The Bank also continued to refuse to provide the information which she sought concerning the loan account. However, in response to a demand from the Bank, she paid $154,125.00 on the loan between April 1991 and August 1992. The Bank paid the

insurance premiums by debiting the loan account. She was granted probate as executrix of the will of her husband on 27th July 1995, but the Bank still refused to provide the information to her concerning the loan account until 16th October 1995.

[7] Mrs. Martin also alleged in her claim that the house was damaged by Hurricane Louis and the insurance company paid $152,032.29, which was the estimated cost for repairing the house, to the Bank. Her understanding of clause 1(6) of the charge on the property was that that sum of money should have been applied to repair the house in the first instance. The money should only have been applied towards the discharge of the loan if the house was beyond repair. However, the Bank applied the funds towards the discharge of the loan and interest thereon and provided nothing from it to repair the house. It was in September 1996 that the Bank informed her that it had debited the sums of $74,516.54, $233,383.00 and $139,993.31 from the loan account for annual insurance premiums, interest payments and the repayment of principal, respectively.

[8] Mrs. Martin asserted in the claim that the Bank caused her to suffer $307,026.76 loss and damage because of the manner in which the Bank handled the matters concerning the loan account in general. She sought a declaration that the true purpose for requiring the insurance policy was to protect the house and to keep it in a state of good repair. She also sought an order for the taking of an account of all monies paid on the loan account; an order that the Bank is in breach of contract because it failed to apply the proceeds of the insurance towards the repair of the house and an order that the Bank should repay the sums lost to her. She also claimed damages and costs.

The procedural process

[9] The pleadings process in the substantive claim, which commenced under the old Supreme Court Rules 1970, has seen many turns of events. It is sufficient for present purpose, however, to focus upon the entry of the default judgment. Solicitors for Mrs. Martin requested judgment to be entered for the declarations

prayed in the claim. These included a declaration that the reason why the Bank required the policy of insurance on the building was to protect the building from damage and to keep the building in a state of good and proper repair; a declaration that on a true construction of Clause 1(6) of the Charge, the insurance proceeds paid by the insurance company to the Bank after the building was damaged by the hurricane was only to be applied towards discharging the loan if the building could not have been repaired; and a consequential declaration that the Bank was in breach of contract because it failed to apply the proceeds of the policy of insurance paid by Sun Alliance towards the repair and restoration of the building on the charged property.

[10] The request for entry of the judgment was also for an order for the taking of an account of all money paid on the loan between 12th December 1985 and 31st October 1996 and for an inquiry into the manner in which the Bank applied the money in respect of the principal sum owed and interest thereon. The request was also for a consequential order that the Bank should pay to Mrs. Martin $154,994.76 to be applied towards the payment of interest after 10th March 1988. The request for entry of judgment also sought orders for damages for breach of contract to be assessed in accordance with rule 16.2 of CPR 2000 and for costs pursuant to rule 65.5 of the CPR 2000. Importantly, in my view, there was the following statement at the end of the request:

> "The Claimant is in a position to prove the amount of damages and requires One (1) hour to deal with the assessment."

[11] The default judgment was entered for Mrs. Martin on 8th January 2007 in the following terms:

> "No defence having been filed by ANTIGUA COMMERCIAL BANK LIMITED, the defendant in this matter.
> AND UPON a request for entry of judgment filed on 8th January, 2007 on behalf of the claimant LOUISE MARTIN.
> IT IS THIS DAY ADJUDGED that the defendant do pay to the Claimant an amount to be assessed by the Court."

[12] On 6th February 2007 the Bank filed a draft defence. At the same time, the Bank applied to set aside the judgment in default on the ground that the judgment was irregular because it was not obtained in accordance with sub-rules 12.10(4) and (5) of CPR 2000 and the Practice Direction on default judgment that was issued in 2005.

The reasons for the refusal to set aside

[13] Sub-rules 12.10(4) and (5) provide that where default judgment is entered on a claim in which the remedies claimed are other than for liquidated sums, an application should be made for the court to determine the terms of the default judgment, which judgment shall be entered in such form and terms as the court considers the claimant is entitled to on the statement of claim. The Practice Direction requires the court office to refer the papers filed in the case to a judge who should settle the terms. The Bank insisted that the judgment was not referred to a judge, with the result that the judgment does not reflect the claim on which the orders which Mrs. Martin sought in the request for entry of judgment were based. The Bank urged the court to find that this was a fatal error which required the court to set aside the default judgment. Thomas J refused to set it aside.

[14] In refusing to set aside the judgment, the learned judge noted[6] that the provisions of rule 13.3 of CPR 2000, which set out the matters that are to be considered in determining whether to set aside or vary a default judgment, states:

> "13.3 (1) If rule 13.2 does not apply, the Court may set aside a judgment entered under Part 12 only if the defendant –
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> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
>
> (c) has a real prospect of successfully defending the claim."

[15] The learned judge observed that the constituents of rule 13.3 are conjunctive. The result, he said, was that the Bank was required to satisfy each aspect in order to

[6] At paragraph 5 of the judgment.

move the court to set aside the judgment. He found that the Bank had applied as soon as reasonably practicable and had therefore satisfied rule 13.3(1)(a) because a period of only 15 days had elapsed between the service of the judgment on the Bank and the filing of the application to set it aside.[7] The learned judge also found that the Bank had a real prospect of defending the claim successfully and that the probability of either party prevailing at a trial was equal.[8]

[16] However, the judge found that the Bank did not satisfy rule 13.3(b) of CPR 2000 in that it did not provide a good explanation for its failure to file a defence. He found, additionally, that Mrs. Martin was prejudiced by that failure given that the case was first instituted in 1997. In arriving at this conclusion, the learned judge noted the contention by counsel for the Bank that after Mrs. Martin filed the amended claim form in 2001 the case was involved in interlocutory proceedings which led to the dismissal of the claim on 14th April 2003 by the High Court, with the result that there was no requirement to file and serve a defence during the period 2001 to 2003. The judge also noted the further contention by learned counsel that shortly after the claim was dismissed in April 2003, Mrs. Martin appealed on 22nd April 2003. The appeal was not heard until 23rd November 2006. During that time the case stood dismissed and there was no reason or requirement to file a defence.[9]

[17] The learned judge observed that the Court of Appeal restored the claim as of 26th November 2006. He found that the Bank did not file a defence when it could have filed it prior to the commencement of interlocutory proceedings in April 2003. The learned judge stated[10] that there was a period of 11 months prior to the Bank's interlocutory application of 4th April 2003, when the Bank filed no defence and did not apply for an extension to do so. The judge noted, on the other hand, that Mrs. Martin's claim was filed since 9th April 1997 and she was still "at square one".

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[7] See paragraph 9 of the judgment.
[8] See paragraph 20 of the judgment.
[9] See paragraph 10 of the judgment.
[10] At paragraph 28 of the judgment.

A procedural appeal and an interlocutory order?

[18] It is common ground that the appeal is a procedural appeal. The term "procedural appeal" is defined in rule 62.1(2) of CPR 2000 to mean an appeal from a decision of a judge, master or registrar, which does not directly decide the substantive issues in a claim. However, the definition specifically 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 CPR 2000; 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, an order made before proceedings are commenced or against a non-party and a search order made under Part 17 of CPR 2000. The decision of the judge did not directly decide the substantive issues in the claim and does not fall under the types of orders specifically excluded from the definition.

[19] Rule 62.10 of CPR 2000, which provides for the hearing of procedural appeals, states:

> "62.10 (1) On a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal.
>
> (2) The respondent may within 7 days of receipt of the notice of appeal file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal.
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> (3) The general rule is that a procedural appeal is to be considered on paper by a single judge of the court.
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> (4) Consideration of the appeal must take place not less than 14 days nor more than 28 days after filing of the notice of appeal.
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> (5) The judge may, however, direct that the parties be entitled to make oral submissions and may direct that the appeal be heard by the court.
>
> (6) Any oral hearing must take place within 42 days of the filing of the notice of appeal.
>
> (7) The judge may exercise any power of the court whether or not any party has filed or served a counter-notice."

[20] In Nevis Island Administration v La Coppropete Du Navire[11] this court indicated that for the purpose of determining whether a party requires leave to appeal from a decision of the High Court, rule 62.10 of CPR 2000 should be read with section 31(3)(g) of The Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act.[12] The equivalent section for the purpose of this case is section 31(2)(g) of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act.[13] Under this latter section, any person who wishes to appeal against an interlocutory judgment or order of the High Court must first obtain the leave of the judge or of this court. This subsection specifically exempts from the leave requirement interlocutory judgments or orders which relate to the liberty of the subject or the custody of infants; orders granting or refusing an injunction or appointment of a receiver. It also exempts an order in the case of a decree *nisi* in a matrimonial cause or a judgment or order in an admiralty action determining liability. This court has consistently stated that the application test is to be used to determine whether an order is interlocutory or final. It has also decided that, based on this test, an order which is made on an application which would not necessarily bring an end to the proceedings, whichever way the decision on it is made, is an interlocutory and not a final order.[14]

[21] In this case, the Bank did not prevail on its application to set aside the default judgment. If it did, the consequential order would have set aside the judgment and the pleading process would have continued ultimately to trial. The application would not necessarily have brought an end to the proceedings whichever way the decision on it was made. It appears, therefore, that the appeal was a procedural appeal as well as an appeal from an interlocutory order. However, the question arose whether this case falls into an exception.

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[11] Op. Cit. at note 4.
[12] No. 17 of 1975.
[13] Cap. 143 of the Revised Laws of Antigua and Barbuda, 1992, hereinafter referred to as "the Supreme Court Act".
[14] See the locus classicus, Othneil Sylvester v Satrohan Singh, St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 and the cases mentioned in paragraph 2 of this judgment.

Does this case fall into an exception

[22] Sir Clare Roberts, QC, submitted on behalf of the Bank that the order appealed from is not interlocutory but rather final because the decision not to set aside the judgment clearly ended the matter with respect to liability. He cited as authority the White Book (2003), which states as follows:[15]

> "A default judgment is a judgment without trial… However where the claim is for an unspecified sum of money the judgment is final as to liability but there will be a trial to decide quantum of damages".

[23] Sir Clare further submitted that this case comes under the exception to the application rule enunciated in White v Brunton,[16] so that, in effect, it was a 'split trial' in which all questions of liability and breach of contract were determined separately from any issue as to damages. He urged this court to find that particularly because the claim consisted of declarations and was not only for an unspecified sum, the default judgment determined the issue of liability and set the issue of quantum of damages for trial. In that sense, he insisted, the default judgment was final with regard to liability, and, consequently, the Bank does not need leave to appeal. He also referred to this court's decision in Jn. Marie and Sons Ltd..[17]

[24] The claim in Jn. Marie and Sons Ltd. arose out of the shooting death of the father of the claimant. The substantive issues in the claim were negligence and the quantum of damages. In the presence of all counsel appearing, the learned judge made an order in which she entered summary judgment for the claimant "due to non compliance of Case Management Orders". Learned counsel for the defendants, the intended appellants in the appeal proceedings sought to appeal but did not seek leave to do so. The appeal was struck out by a single judge of this court as a nullity on the ground that the intended appellants should first have applied for leave to appeal. The intended appellants applied for a review of that decision to the full court of appeal. They contended that inasmuch as the judge

[15] The White Book (2003), paragraph 12.0.2, at page 299.
[16] [1984] 2 All ER 606.
[17] Op. Cit., at note 5.

entered summary judgment, that decision was determinative of liability and was to that extent a final decision for which no leave was required. Learned counsel for the intended appellants relied on White v Brunton and Vehicles and Supplies Ltd. et al v Financial Institutions Services Ltd.[18]

[25] In the judgment in Jn. Marie and Sons Ltd., Sir Brian Alleyne CJ (Ag.) in distinguishing White v Brunton and Vehicles and Supplies Ltd., stated:[19]

> "[19] Learned counsel for the applicant drew the court's attention to the case of White v Brunton 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.
> [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. 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."

[26] In my view White v Brunton is not applicable in the present case because in that case liability was established by a judge on the actual trial of a preliminary issue. That is what made it a case of a split trial. Accordingly, the English Court of Appeal stated[20] that all questions of liability and breach of contract were tried before and separately from the issue of damages. In the present case, on the other hand, there was no trial of any issue establishing liability. There was an interlocutory order by which judgment was entered for Mrs. Martin.

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[18] [2005] UKPC 24 (Jamaica)
[19] At paragraphs 19 and 20 of the judgment in Jn. Marie and Sons Ltd..
[20] See page 608 of the judgment.

[27] Additionally, in Vehicles and Supplies Ltd., their Lordships stated quite clearly[21] that a judgment in default of appearance, or in default of defence, lacks finality so long as it is liable to be set aside. In the present case, these proceedings are in this court because of an application that was brought on behalf of the Bank to set aside the judgment in default of defence which was entered for Mrs. Martin.

[28] In the foregoing premises, I am confirmed in the view that the order of Thomas J was an interlocutory order and that the Bank therefore required leave to appeal against it. Since the Bank filed its notice of appeal without seeking leave to do so, that notice is a nullity and is accordingly struck out. The Bank shall pay Mrs. Martin's costs, which shall be two thirds of the $2,500.00 awarded in the court below or $1,667.67. The Registrar shall set down the matter for assessment at the earliest time that is convenient to the court and to the parties.

Hugh A. Rawlins
Justice of Appeal

I concur

Brian Alleyne, SC
Chief Justice (Ag.)

I concur

Ola Mae Edwards
Justice of Appeal (Ag.)

[21] In paragraph 22 of the judgment.