ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

HCVAP2007/0029

ABRAHAM ZION

Respondent /Appellant

v

[1] GRAHAM FERGUSON LACEY
[2] SEA SHELL REEFS LIMITED

Applicant/Respondents

On paper

Before:

The Hon. Mr. Denys Barrow, SC

Appearances:

Thomas John & Co. for the Applicant, Respondent No. 1
Hill & Hill for the Respondent/Appellant

2008: February 19.

DECISION

[1] The first respondent, the applicant, applies to strike out a Notice of Appeal filed by the appellant on 31st December, 2007 against an order of David Harris J dated 21st November, 2007 (the order). The order followed the trial of the claim on 21st October, 2006 by Thomas J. and judgment delivered on 6th February, 2007 ordering specific performance of a certain agreement for the sale of shares. An appeal against the judgment of Thomas J was subsequently struck out.

[2] On 13th March, 2007 the applicant filed an application to enforce the judgment. On the hearing of this application Harris J made the order which provided, among other things, that a Purchase Money Mortgage (the PMM) be approved by the court. Essentially, it is

against the approval of the PMM that the appellant has appealed although there are other substantive grounds of appeal against the order.

[3] The application to strike out the Notice of Appeal claims that (1) the appeal is an abuse of process, (2) it was filed out of time and contrary to part 62.5, (3) it is a nullity and (4) the appellant should comply with the terms of the order. Both sides filed very helpful submissions with authorities after filing affidavits and exhibits in support of their respective positions. It is practical to deal firstly with claims (2) and (3) of the application to strike out and to treat them together.

[4] The common basis of these two claims is that the appeal is against an interlocutory order. The applicant contends this is a procedural appeal and the appeal should have been filed within 7 days of the date the decision appealed against was made; see rule 62.5(a). More fundamentally, the applicant contends the appeal being against an interlocutory order could only have been brought if leave was first granted and since no leave to appeal was granted the appeal is a nullity. Both sides accept that this proposition was established by a single-judge decision of this court in Oliver Mcdonna v. Benjamin Wilson Richardson[1].

[5] Counsel for the appellant argued that the order was a final order, using the application test, because if Harris J had approved or refused to approve the PMM that decision would have brought the litigation to an end. With respect, that is a wrong view. First of all, the definition of ``interlocutory in Jowitt's Dictionary of English Law[2], confirms that "interlocutory applications'' in an action include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment…'' The application that Harris J heard was thus capable of being an interlocutory application.

[6] Secondly, the application test, as restated in the Oliver Mcdonna case, establishes that an order is only a final order if whichever way an application is decided it would bring an end to the litigation or at least to the litigation of the particular issue. On the particular

[1] Anguilla Civil Appeal No. 3 of 2005, Judgment delivered 29th June, 2007
[2] 2nd edition

application that gave rise to the order, if the Judge had refused to approve the PMM, that would not have brought to an end the matter of the enforcement of the judgment for specific performance. Therefore, in conformity with the pronouncement in Oliver Mcdonna the order was an interlocutory order. To repeat, that case decided that an appeal that can only be brought with leave, such as an appeal against an interlocutory order, is a nullity if no leave was obtained.

[7] In this case the Appellant says that if he needed leave the court should treat his affidavit as an application for leave and for an extension of time. This is the same resort the purported appellant made in the Oliver Mcdonna case, which was rejected in that case, because the appellant did not make a proper application, by Notice, supported by affidavit, for an extension of time for appealing and for relief from sanction. An application for relief from sanctions in a case such as this will normally be considered against the criteria and conditions contained in rule 26.8; see Dominica Agricultural and Industrial Development Bank v. Mavis Williams[3]. Among the mandatory conditions which an applicant needs to satisfy is the one at rule 26.8(2)(c) -- that the party in default has generally complied with all other relevant orders.

[8] On the present application the applicant's first claim is abuse of process by the appellant in failing to comply with the court's order. The applicant alleges that the appellant's non-compliance with the court's order is of such significance as to amount to contempt of court on the part of the appellant.

[9] Had the appellant applied for relief from sanction, therefore, the appellant would have been in a position to put forward a case of non-compliance and, therefore, of failure to satisfy one of the mandatory conditions, in opposition.

[10] It would be unfair to permit the appellant to avoid making a proper application and deny the respondent the opportunity and the right to oppose the application. The appellant's "application" in an affidavit in opposition to a strike-out application denies the respondent

[3] Dominica Civil Appeal No. 20 of 2005, Judgment delivered 29th January, 2007

even the opportunity of filing an affidavit in response. Accordingly, I reject the attempt to apply for an extension of time and relief from sanctions in this manner.

[11] The application to strike out the notice of appeal as a nullity succeeds. Costs to the applicant of $2,000.00

Denys Barrow, SC
Justice of Appeal