

GRENADA

IN THE COURT OF APPEAL

HCVAP 2008/004

In the matter of Section 43 of the
Banking Act, No, 40 of 1993

And in the matter of Section 295 of the
Companies Act No. 35 of 1994

And in the matter of an Application by the
Minister of Finance for an order for the
appointment of DAVID HOLUKOFF,
Managing Director of Krall Associates
UK Ltd. As RECEIVER of CAPITAL
BANK INTERNATIONAL LIMITED, a
Grenadian Financial Institution licensed
in accordance with the Banking Act

BETWEEN:

CAPITAL BANK INTERNATIONAL LIMITED

Appellant

and

THE HONOURABLE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal (Ag.)

On written submissions of

Mr. Cajeton A.K. Hood for the Appellant only

Respondent unrepresented

Mr. Hugh Wildman on record for the Respondent

2008: May 6;14.

Civil Procedure – Procedural Appeal – Interlocutory Appeal – whether leave is required – rule 62.10 of the Civil Procedure Rules 2000 – section 33(2) (g) (ii) of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336

An order appointing a receiver was made without notice on 15th February, 2008. The appellant applied to set aside the order on 18th February, 2008, which application was refused. The appellant appealed against this decision by filing a notice of appeal and written submissions pursuant to rule 62.10 of the **Civil Procedure Rules 2000 (CPR 2000)**.

Held, striking out the notice of appeal and making no order as to costs:

- (1) The decision refusing to set aside an order appointing a receiver was an interlocutory order as it did not finally determine the issues between the parties. The appeal against this interlocutory order fell within the category of procedural appeals, not having been excluded under CPR 62.1(2).
- (2) An order granting or refusing the appointment of a receiver is excepted from the leave requirement under section 33(2) (g) (ii) of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336. An order refusing to set aside the appointment of a receiver does not however fall within this exception and would require leave.

Oliver McDonna v Benjamin Wilson Richardson Anguilla Civil Appeal No. 3 of 2005 followed.

- (3) The appeal must be struck out as a nullity as leave to appeal was not obtained.

Antigua Commercial Bank v Louise Martin Antigua and Barbuda Civil Appeal No. 22 of 2007 followed.

JUDGMENT

- [1] **EDWARDS, J.A. [AG.]:** This Notice of Appeal was filed by the appellant on the 27th February 2008. It states that it is against the decision of Henry J made upon the appellant's application filed on the 18th February 2008 to set aside an order made at the first hearing of the fixed date claim on the 15th February 2008. That order appointed Mr David Holukoff as receiver of the appellant bank. The fixed date claim was filed on the 14th February 2008 but was not served on the appellant bank before the first hearing. The order made on the fixed date claim appointing the receiver was made without notice.
- [2] The learned judge heard the appellant's application on the 25th and 26th February 2008. On the 4th March 2008 Henry J delivered her written decision which denied the application to set aside the order dated 15th February 2008, and amended the order to read: " 'David Holukoff, a Managing Director of Kroll Associates UK Limited (Grenada Branch), of the Netherlands Building, Grand Anse, St. George's Grenada, having been appointed by the

Minister of Finance pursuant to Section 43 of the Banking Act, he is hereby confirmed as Receiver of Capital Bank International Limited, ("the Bank") and shall act as Receiver in accordance with the directions hereunder.' Paragraph 2 is amended to read: 'Upon the Receiver having provided to the court proof of professional indemnity insurance in the amount of five million United States Dollars, no further posting of security is required herein.' "

- [3] The appellant's notice of appeal states that the appeal is pursuant to CPR 62.10 which governs procedural appeals. The appellant sought also to have the advantage of the procedural appeal proceeding as a summary appeal under CPR 62.6 (1). This rule allows the appeal to be dealt with summarily without the production of the full record where specific statutory conditions are met. Although the appellant's counsel satisfied some of the conditions stated in rule 62.6 (1) (a) (i) and (ii) and filed the certificate that the appeal is of exceptional urgency, relates to specific issues of law, and can proceed without the production of the full record, the unanswered letter addressed to respondent's counsel requesting agreement to the summary process showed that the condition in rule 62.6 (b) had not been met. Consequently I determined on case management that it could not proceed summarily in the absence of the respondent's agreement that it should proceed as such. As a result of my directions a copy of the respondent's fixed date claim with supporting affidavit of Mr. Timothy N.J. Antoine was transmitted to this court from the High Court Registry.
- [4] The respondent has filed no written submission in opposition to the appeal although the notice of appeal was served on the Solicitor General on the 13th March 2008, and the appellant's submissions though filed out of time on the 9th April, 2008 were also served on that day. Case management directions given on the 17th March 2008 and the 15th April 2008 also required the respondent to file and serve submissions by the 7th April 2008 for the first order, and by the 30th April 2008 for the second order.

Procedural Issue

- [5] The appellant would be aware that the issue as to whether this procedural appeal can proceed without the leave of the court arises. Paragraph 1 of the case management directions dated the 17th March 2008 indicated that “...the court must be satisfied that the order appealed against is not a “procedural appeal” requiring the leave of the court. The submissions of learned counsel Mr. Hood have not addressed the issue.

The Nature of the Appeal

- [6] In **Oliver McDonna v Benjamin Wilson Richardson**¹ Barrow J.A. analysed the nature and object of a procedural appeal under CPR 62.10. This rule prescribes how a procedural appeal should be dealt with. CPR 62.1 (2) gives the definition of a “procedural appeal” as “an appeal from a decision of a judge, ...which does not directly decide the substantive issues in a claim but excludes – (a) to (c)...(d) an order granting or refusing an application for the appointment of a receiver.” The learned Barrow J.A. explained that the object of creating a category of appeals called “procedural appeals” is to channel certain matters on to a fast track for early disposal at the appellate level, and that the decisions from which a procedural appeal lies include only interlocutory and not final orders. Procedural appeals are therefore a subset of interlocutory appeals.
- [7] In the absence of a statutory definition as to what is an interlocutory judgment or an interlocutory order, it is well established by now that our courts apply a test called the “application test” to determine whether or not the order or decision is interlocutory. The application test looks at the outcomes that were possible on the application. The test is whether a decision on the application whichever way it went would have finally determined the issues between the parties.
- [8] Looking at the outcomes that were possible on the appellant’s application to set aside the order made on the 15th February appointing the receiver, had the learned judge decided to

¹ Anguilla Civil Appeal No 3 of 2005 at pages 5 to 6

set aside the order, such a decision would not have brought an end to the proceedings on the fixed date claim. Because the case would not have ended regardless of the order made on the hearing of the application, the decision of Henry J is an interlocutory judgment and/ or an interlocutory order.

The Category of the Interlocutory Order

[9] Section 33 (2) (g) (ii) of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336 excepts an interlocutory judgment or order that grants or refuses the appointment of a receiver from requiring leave; while the definition of procedural appeal” under CPR 62.1 (2) (d) states that an appeal from an order made on an application for the appointment of a receiver, which grants or refuses the application is not to be categorised as a “procedural appeal”.

[10] The respondent’s fixed date claim was the application upon which the order granting the appointment of a receiver was made and not the appellant’s application filed on the 18th February 2008. Consequently, the decision and order of the learned Henry J which is the subject of this notice of appeal does not fall in the category of an interlocutory judgment or order which is exempt from the leave requirement. Neither would the appeal be excluded from the fast track procedural appeal category. This decision and order of Henry J is an interlocutory judgment or order which does not lie without the leave of the High Court Judge or the Court of Appeal.

[11] In **Antigua Commercial Bank v Louise Martin**² Rawlins J.A. (as he then was) summed up on the result of filing a notice of appeal against an interlocutory judgment without leave, in the following manner:

“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 **Pirate Cove Resorts Limited and Another v Euphemia Stephens and others [St Vincent and the Grenadines Civil Appeal No. 11 of 2002 (2003)]**; **Maria Hughes v Attorney General of Antigua and Barbuda [Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004)]**;

² Antigua and Barbuda Civil Appeal No 22 of 2007 (delivered 15th January 2008), paragraph 2

Asian Group Limited and Another v TNK Industrial Holdings Limited [British Virgin Islands Civil Appeal No. 22 of 2003 (7th June 2004)]; Nevis Island Administration v La Copproprete Du Navire J31 and Others [St. Kitts and Nevis Civil Appeal No. 7 of 2005 (29th December 2005)]; Jn Marie and Sons Ltd. and Another v Jamie St. Louis [St. Lucia Civ. Appeal No. 14 of 2006 (16th April 2007)].”

[12] In the circumstances, regrettably, the notice of appeal must be struck out. Since the respondent has not participated in the appeal I make no order as to costs.

Ola Mae Edwards
Justice of Appeal [Ag.]