SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2007/014

BETWEEN:

[1] CHRISTENBURY EYE CENTER
[2] CHRISTENBURY BUSINESS PROTECTION LLC
[3] JONATHAN DAVID CHRISTENBURY

Appellants

and

[1] FIRST FIDELITY TRUST LIMITED
[2] FIDELITY INSURANCE COMPANY LIMITED
[3] KEITHLEY LAKE

Respondents

Before:

The Hon. Hugh A. Rawlins	Chief Justice
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Ms. Angela Cozier for the Appellants
Ms. Keinya Blake for the Respondents

2008: October 27, 30;
November 19.

Civil – Practice and Procedure – refusal of leave to appeal –single judge of court of appeal – no hearing – whether application for leave should have been referred to the full court – application to the full court to discharge the order of refusal – CPR 62..16(4) – whether this rule confers jurisdiction on full court to give leave to appeal – absence of any specific rule to permit reconsideration – delay in making application – abuse of court's process –

A single judge of the Court of Appeal, without holding an oral hearing, refused to give leave to appeal. The applicants applied to the full court to discharge the order of the single judge

refusing leave. The application to the full court was stated to be brought under rule 62.16(4) Civil Procedure Rules 2000 (CPR 2000). The applicants argued that because he was minded to refuse leave the single judge should have directed that an oral hearing be held before the full court. The application to discharge the refusal of the single judge was made more than three months after the date of that refusal.

Held: dismissing the application and awarding costs of $1,000.00 to the respondents.

1. The power of the full court under rule 62.16 (4) to vary or discharge an order of a single judge was confined to the orders mentioned in rule 62.16, namely, orders for an injunction, a stay of execution, an extension of time and the giving of security for costs.

2. The single judge having refused leave, there was no appeal in existence; therefore there was no jurisdiction in the Court of Appeal, at that point in time, to do anything because there was no appeal.

3. No specific provision in CPR 2000 or in other legislation relating to the power of the full court to reconsider an application for leave to appeal had been brought to the court's attention. In those circumstances the court would resort to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act which required it to exercise its jurisdiction in accordance with the practice and procedure for the time being in force in England. Rule 52.3 (4) and (5) of the English Civil Procedure Rules, which permit a person seeking leave to appeal to request a reconsideration at a hearing when leave to appeal has been refused without a hearing, seemed applicable in the circumstances.

4. The explanation that parties and representatives are located abroad to explain a delay of three and a half months was meaningless in this age of daily air travel, courier services, telephone, facsimile and internet communication. Therefore this delay in appealing was an abuse of process and the application was dismissed, with costs to the respondents.

JUDGMENT

[1] BARROW, J.A.: The application before this court is to discharge the order of a single judge of the Court of Appeal, Thomas JA (Ag.), refusing the application that these applicants had made for leave to appeal against the decision of Leigertwood-Octave J striking out the claim form and statement of claim as against the first and third respondents. Among other grounds the applicants urge that the single judge should have directed that a hearing be held instead of proceeding to decide the application for leave only on the papers that were filed.

[2] This application to the full court is stated to be based on rule 62.16 (4) of the Civil Procedure Rules 2000 (CPR 2000). It is helpful to reproduce the full rule, which states:

> "Powers of single judge of the court, master and Chief Registrar to make certain Orders;
> 62.16(1) A single judge of the court may make orders for –
>
> (a) an injunction restraining any party from disposing of or parting with the possession of the subject matter of an appeal pending the determination of the appeal;
> (b) a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal:
> (c) extension or abridgement of any time limit prescribed in this Part;
> (d) the giving of security for any costs occasioned by an appeal.
>
> (2) The Chief Justice may designate a master or Chief Registrar to make orders for –
>
> (a) extension or abridgement of any time limit prescribed in this Part;
> (b) the giving of security for any costs occasioned by an appeal.
>
> (3) An order made by a master or the Chief Registrar may be varied or discharged by a single judge.
>
> (4) An order made by a single judge of the court, a master or the Chief Registrar may be varied or discharged by the court."

[3] The heading of this rule is a fair indication of its scope. The rule speaks to the powers that the specified officials of the court of appeal may exercise. No general powers are conferred; rather, specific powers are conferred. In relation to a single judge, these powers are stated to be to make orders for an injunction, a stay of execution, an extension of time and the giving of security for costs. The provision in paragraph (4) of rule 62.16, for the full court to vary or discharge an order made by a single judge, seems necessarily to be directed to the orders mentioned in paragraph (1) of the rule. The power to vary or discharge is not given in a stand - alone rule but is given in a paragraph in a rule that deals with specific orders that

may be made and hence, as a matter of context, that may be required to be varied or discharged.

[4] The power to grant leave to appeal is contained in a separate rule, that is, rule 62.2. In paragraph (3) of that rule it is stated that an application for leave may be considered by a single judge; in paragraph (4) it is stated that the single judge may give leave without hearing the applicant; and in paragraph (5) it is stated that if minded to refuse leave the single judge may direct that there should be a hearing of the application for leave and whether the hearing should be held by the full court or by a single judge. CPR 2000 makes no provision for dealing with the situation where a single judge refuses to give leave to appeal. It emerged in the course of argument before this court that it is because of that state of the rules that Ms. Cozier, counsel for the applicants, sought to bring herself within the scope of rule 62.16 (4) and ask this court to "discharge" the order of Thomas JA (Ag.) refusing leave to appeal.

[5] It is difficult to see how the applicants could bring themselves within the scope of rule 62.16 and seek the discharge of a refusal of an order. I suppose it could be argued that the refusal to make an order is itself an order and that such an order can be discharged. My difficulty with an argument along those lines is not least because of the clear decisions of this court that if an appeal may be brought only with leave, no appeal exists unless leave has been obtained.[1] The single judge having refused leave, there was no appeal in existence and in the course of which an application could be made to the full court of appeal to discharge an order. At that point there was no jurisdiction in the Court of Appeal to do anything because there was no appeal.

[6] Interestingly, in relation to criminal appeals, provision is made by statute for dealing with the situation where a single judge refuses leave to appeal in criminal cases.

[1] Nevis Island Administration v La Copproprete Du Navire J31 Civ. App. No. 7 of 2005, (judgment delivered December 29, 2005 per Rawlins JA) and Oliver Macdonna v Benjamin Wilson Richardson Civ. App. No. 3 of 2005 (judgment delivered June 29, 2007 per Barrow JA)

The jurisdiction in criminal matters is contained in the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act.[2] In section 55 it is provided:

> "55. The powers of the Court of Appeal under this Act –
> (a) to give leave to appeal; …" may be exercised by any Judge of the Court of Appeal in the same manner as they may be exercised by the Court of Appeal, and subject to the same provisions; but, if the Judge refuses an application on the part of the appellant to exercise any such powers in his favour, the appellant shall be entitled to have the application determined by the Court as fully constituted for the hearing and determination of appeals under this Act."

[7] It follows, if this had been a criminal appeal that upon the refusal of a single judge to give leave to appeal the appellant would have been entitled to have that same application for leave determined by the full court. This, however, was not a criminal appeal and that section does not avail. The reason for mentioning it is to make the point that the Supreme Court Act deliberately made provision in relation to criminal but not in relation to civil appeals that deals with the refusal by a single judge to give leave to appeal. The absence of such provision, it would seem to me, triggers section 29 of the Supreme Court Act, which reads:

> "Practice and procedure in the Court of Appeal
> 29 The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Act and rules of court and where no such special provisions are contained in this Act or rules of court such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England –
> (a) in relation to criminal matters, in the Court of Appeal (Criminal Division);
> (b) in relation to civil matters, in the Court of Appeal (Civil Division)."

[8] The practice and procedure in England in relation to the refusal of a single judge to give permission[3] to appeal is found in rule 52.3 of the English Civil Procedure Rules, specifically in paragraphs (4) and (5), which state:

> "(4) Where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.

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[2] Formerly, The West Indies Associated States Supreme Court (Saint Christopher, Nevis and Anguilla) Act, 1975, No. 17 of 1975

[3] In place of 'leave' the expression now used in England is 'permission' to appeal.

(5) A request under paragraph (4) must be filed within 7 days after service of the notice that permission has been refused."

[9] I do not think it matters that the English rule does not speak specifically to requesting reconsideration by the full court of an application that was made before a single judge. What matters is that the rule provides that where there has been no hearing before permission is refused, the person seeking permission may request a reconsideration of the decision at a hearing. The full court necessarily has the jurisdiction to give leave that a single judge has; this is the premise of the provision in rule 62.16 (4) that permits the single judge to direct that an application for leave should be heard by the full court. It seems to me the applicants should have applied for a reconsideration of their application and identified the English practice and procedure as the basis of their request. Although the applicants made the wrong application by invoking the wrong statutory provision I think it just to treat the application that was made as having been made pursuant to section 29 of the Supreme Court Act and the English rule 52.3, because it contained all the material and information that a properly made application would have needed to contain. There is, however, an aspect of the application that is troubling and that is its timing.

[10] Leigertwood–Octave J made the strike out order on 15th May 2007. Thomas JA refused leave on 22nd January 2008. The applicants made the application to the full court on 9th May 2008, some three and a half months later. The applicants filed an affidavit seeking to explain their delay. They stated the application was not brought at an earlier date because it was necessary to take complete instructions from the applicants, two of which are located outside the jurisdiction, as well as the overseas representatives of the applicants. The applicants further stated they were not able to provide instructions in time for an earlier filing because they are located abroad and found it difficult to confer properly with their legal advisers until now.

[11] That explanation for a delay of three and a half months is meaningless in this age of daily air travel, courier services, telephone, facsimile and internet communication. It does not deserve any further treatment than that.

[12] In addition, Ms. Cozier contended that no time limit is prescribed for making the application she made. I do not accept that contention. Had the applicants made the request for reconsideration in accordance with the English rule 52.3 they needed to make it within 7 days after service of the notification that leave was refused. Having extended the benefit of that rule to the applicants this court can hardly ignore the time limit that the rule contains. Moreover, it is not some peculiar time limit that the English rule contains but one that is entirely consistent with comparable time limits in our Rules. Thus, the original application for leave to appeal was required to be brought within 14 days of the decision sought to be appealed.[4] Had this been an application to the full court in a criminal appeal following the refusal of leave by a single judge it would have had to be made within five days of the refusal.[5] Had this been an appeal against a final decision of the court after a full trial, which is to say when no leave is required, the notice would have had to be filed within 42 days.[6]

[13] In my view, even if there had been no applicable time limit for making this application, the applicants would have been bound to act within a reasonable time. The unexplained and inordinate delay in this case amounted to an abuse of the court's process. A fundamental feature of appeals is that there are strict time limits for bringing them so there can be certainty as to whether litigation is at an end or will continue on appeal. It is inimical to certainty to permit a party who has become bound by a court judgment to decide, at a time of his choosing and in disregard of what is a reasonable time, that he will launch an appeal and destroy the finality that has been reached. This was the principle this court laid down in Dominica Agricultural and Industrial Development Bank v Mavis Williams (No. 1)[7] – that

[4] Rule 62.2 (1)
[5] Section 54 of The West Indies Associated States Court of Appeal Rules, No. 8 of 1968
[6] Rule 62.5 (c)
[7] Dominica Civil Appeal No. 20 of 2005 (judgment delivered January 29, 2007)

deliberate delay in appealing is an abuse of process. The principle can be no less applicable to applications for leave to appeal than to appeals.

[14] I would dismiss the application and award costs of $1,000.00 to the respondents.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Michael Gordon
Justice of Appeal [Ag.]