

ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2010/021

BETWEEN:

[1] VERNON S. VIERA
[2] VERNON S. VIERA & ASSOCIATES
[3] W. MANAGEMENT CO. LLC

Appellants/Defendants

and

[1] GUY MITCHELL
[2] AMY MITCHELL

Respondents/Claimants

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

Appearances:

Mr. Vernon S. Viera for the Appellants

Mr. Gerhard Walbank of Webster Dyrud Mitchell for the Respondents

2011: March 22.

JUDGMENT

[1] **EDWARDS, J.A.:** The appellants filed a Notice of Appeal on 23rd December 2010 against the decision of Belle J contained in an order dated 9th July 2010 which was entered on 13th December 2010. This order remained unperfected for five months after it was made, following an assessment of damages hearing.

[2] The assessment was carried out subsequent to judgment being entered on 18th December 2009, following a request for judgment pursuant to Part 12 of **CPR 2000**. The relevant parts of the judgment that was entered following the request states:

"IT IS HEREBY ORDERED THAT –

1. Judgment be entered for the claimants in the sum of US\$704,953.28 or its equivalent EC\$1,895,055.40 including costs.

IT IS FURTHER ORDERED AND DECLARED THAT –

The Third Defendant holds the sum of US\$704,958.28 or its equivalent EC\$1,895,055.40 on constructive, further or alternatively resulting trust for the Claimants. ...

6. Damages to be assessed.

7. Interest to be assessed.

8. The Defendants shall pay Costs of EC\$20,063.00."

[3] It is alleged that the respondents had filed an application on 8th April 2010, with an affidavit, seeking, to claim special damages and an assessment of damages; and that at the hearing of this application the judge denied the appellants the opportunity to file an affidavit in reply. The judge ruled however that the appellants could cross examine the respondents on their affidavit, and proceeded to set the 23rd June 2010 as the assessment trial date.

[4] Further submissions were made by counsel for the appellants on 23rd June 2010, as to whether the respondents could properly claim special damages after judgment was entered where previously they had claimed only general damages in their statement of case. The judge ruled that the assessment would proceed under Rule 12 and not Rule 16.

[5] The decision of Belle J on 9th July 2010 was oral and it is alleged that ex tempore reasons were given by the judge while reading from affidavits of one of the respondents. By the order of Belle J bearing date of the same day, judgment was entered as follows:

"IT IS ORDERED THAT –

1. Damages are assessed in the amount of US\$7,162,875.54 together with Costs pursuant to CPR 2000."

[6] The appellants claim that because the oral decision and the order was unclear as to which of the defendants the damages was assessed against, an application was made on 14th January 2011 by the respondents for clarification of the order. On 21st January 2011 Thomas J clarified the order directing that:

(a) Damages are assessed against the 1st and 2nd named Defendants; and

(b) That the Order be effected as of 13th December 2010.

- [7] There is also an Application for Leave to Appeal and a Stay of Execution of the Order of Belle J which was also filed, apparently out of an abundance of caution, on 23rd December 2010.
- [8] The respondents by their Notice and Submissions opposing the granting of leave to appeal, contend that the application should be refused as it was filed out of time without any application for extension of time and relief from sanction.
- [9] The main question arising for my consideration and determination is: whether the assessment of damages order is an interlocutory or a final order. On applying “**the application test**” it appears to me that the order is a final order as whichever way the assessment went it did and would have finally determined the issue as to what other damages, interests and costs if any of the 2 appellants are to pay the respondents on the claim. Thereafter, it is a question of enforcing the judgment debt.
- [10] In the case of a final judgment or order, the time for appealing under CPR 62.5(c) is 42 days of the date when the order that is the perfected order (in the instant case) was served on the appellant. There is no evidence as what date the order of Belle J, which was entered and perfected on 13th December 2010, was served on the appellant.
- [11] In the premise, it is manifest that the appellant's Notice of Appeal was timely filed; and the appellant's application for leave to appeal is unnecessary.
- [12] Regarding that part of the application for a stay of the order of Belle J pending the determination of the appeal; it appears to me that the appeal raises controversial issues concerning the respondents pleadings and their entitlement to certain damages which may have weighed heavily in the judge's final award of damages. I note further that although the respondents to date have suffered enormous financial loss and prejudice as a result of the appellant's conduct, the appellants

have declared bankruptcy, thereby retarding the ability of the respondents to enforce the judgments obtained against the appellant meaningfully.

[13] Consequently, the respondents are not likely to suffer any additional prejudice if the questioned order or Belle J is stayed pending the determination of the appeal which should be expedited. On the balance of convenience, and after applying the settled principles for a stay of application I would grant a stay.

[14] I therefore make the following order:

- (i) No order is made on the application for leave to appeal as it is unnecessary; and the appellant does not require leave to appeal.
- (ii) The Notice of appeal filed on 23rd December 2010 is validly filed.
- (iii) The execution of the order of Belle J entered on 13th December 2010 is stayed pending the determination of the appeal.
- (iv) The Chief Registrar and the Registrar of the High Court are directed to cause the transcript of the assessment hearing to be prepared expeditiously.
- (v) The progress of the appeal is to be actively case managed and is set for further directions to be given at the Chamber Hearing date in May 2011 concerning the abridgement of time for filing the trial record and submissions of counsel.
- (vi) The appeal is set down for hearing at the sitting of the court in St. Kitts on 4th to 8th July 2011.

Ola Mae Edwards
Justice of Appeal