SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.24 OF 2003

BETWEEN:

ST. KITTS DEVELOPMENT LIMITED

Appellant

and

[1] GOLFVIEW DEVELOPMENT LIMITED
[2] MICHAEL SIMANIC

Respondents

Appearances:
Case considered on written submissions

2003: October 30.

JUDGMENT

[1] ALLEYNE, J.A.: This appeal arises from a decision of Baptiste J on an oral application made without notice at the commencement of the trial whereby it was ordered among other things that the witness statement of one Alvin Shidlowski and 10 documents relating thereto, which had been filed by the Appellant/Claimant in the Court below be struck out, and that the Appellant pay costs in the amount of $7,500.00.

[2] The appeal was assigned to me for hearing as a procedural appeal under Part 62.10 by the Chief Justice.

[3] Learned Counsel for the Respondents in his written submissions has drawn the Court's attention to section 31(3)(f) and (g) of the Eastern Caribbean Supreme Court Act No. 17 of 1975 which provides that no appeal shall lie without the leave of the Judge making the order or of the Court of Appeal from an order as to costs or from any interlocutory order (with certain exceptions not relevant in this case)

given or made by a Judge. The order appealed from is such an order. The order from which the Appellant seeks to appeal is, not only an order as to costs, but also, in respect of the exclusion of the witness statement and related documents, clearly an interlocutory order; White v Brunton[1]; Water and Sewerage Authority v Lilian Waithe[2].

[4] In White v Brunton Sir John Donaldson, M.R. declared that the Court is now committed to the 'application approach' to the question of whether an order is interlocutory or final, as the general rule. His Lordship applied the rule in these terms:

> "The decisive feature is that the 'preliminary issue' was not, when analysed, an issue preliminary to a final hearing, but the first part of a final hearing."

[5] In Water and Sewerage Authority v Lillian Waithe Phillips C.J. (Ag.) approved the decision in Salaman v Warnwer & Ors.[3] and quoted with approval the judgment of Lopes, L.J.:

> "I think that a judgement or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the rights of the parties."

The learned Chief Justice continued:

> "It seems to us that the critical point in determining that an order is final for this purpose, is that it must appear that whichever way it went, in other words, whatever was the decision of the Judge in Chambers in this application, it would have the effect of determining the rights of the parties."

[6] Part 62.2 of the Civil Procedure Rules 2000 (CPR) sets out the procedure to be followed in applying for leave to appeal. The Appellant has not complied with the rules there set out, and has neither applied for nor obtained leave to appeal. The time for doing so has long passed.

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[1] [1984] 2 All E.R. 606
[2] [1972] 21 W.I.R. 498

[7] The trial arose upon a claim by the Appellant for enforcement of a contract of sale involving in excess of US$700,000.00. On November 26th 2002, a case management order was made, including an order for witness statements to be filed and served on or before February 7th 2003. A trial window was fixed for the first half of April 2003. The Respondents failed to file their list of documents in compliance with the timelines set by the case management order, but filed them a month later than the stipulated date. This resulted in a further case management conference at which, among other things, the time for filing and service of witness statements was extended to 28th February 2003. The Case Management Judge further ordered that 'Pleadings of any party in default to be struck out and judgment entered accordingly.' The trial date was set for 29th April, 2003, and all previous directions were preserved by the order.

[8] The Appellant filed a Notice of Application seeking, among other things, an order that witness statements be filed and served on or before 14th March, 2003, and a further, amended application seeking an order for the filing and service of witness statements on or before 16th April 2003, and further, that 'Pleadings of any party in default to be struck out and judgment entered accordingly.' This application was heard by Baptiste J who ordered that the trial date be set for July 28, 29 and 30, 2003. He made no specific order on the application to vary the order for filing the witness statements on or before 28th February. Nevertheless, without having made further application or obtaining an order, the Appellant filed and served a witness statement of Alvin Shidlowski on June 25th 2003, and the parties exchanged statements on June 30th, 2003.

[9] On 16th July Counsel for the Appellant wrote to Counsel for the Respondents expressing his belief that all filings had been completed and requesting that he be contacted if there were any pre-trial issues which could be addressed and hopefully resolved. There was no response to this communication. At the commencement of trial Counsel for the Respondents made an oral application

[3] [1891] 1 Q.B. 734

without notice to strike out the Appellant's statement of claim on the ground that the witness statement of Alvin Shidlowski and the documents relating thereto were filed in breach of the case management order made by Mitchell J on February 14th 2003.

[10] There is no written Judgment or Reasons for Decision. However, the learned Judge has provided a copy of his notes from which it is apparent that his attention was focused on CPR Part 26.4, and in particular on Part 26.4(7), on Part 26.9, and also on Part 1.2. Part 1.2 directs that the Court must seek to give effect to the overriding objective when it exercises any discretion given to it by the Rules, or interprets any rule. The overriding objective is to enable the Court to deal with cases justly.

[11] Part 26.4(1) provides that if a party has failed to comply with any of the rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an "unless order". Paragraph (7) of the rule provides that if the defaulting party fails to comply with the terms of such an order, that party's statement of case shall be struck out. The learned Judge refrained from striking out the Appellant's statement of case as Counsel for the Respondent had asked him to do. Nevertheless Counsel for the Appellant invites the Court to conclude that the learned Judge treated the order of Mitchell J as an "unless order". I cannot draw any such conclusion. The learned Judge did not impose the mandatory sanction provided by rule 26.4(7) for failure to comply with the terms of an "unless order".

[12] Part 26.9, to which Counsel for the Respondent referred in making his application before the Judge, applies, as Counsel pointed out, only where the consequence of failure to comply with a rule, practice direction, Court order or direction has not been specified by any rule, practice direction or Court order. The order made by Mitchell J on February 14, on which Counsel for the Respondent relied at trial, was not made pursuant to the procedure laid down by rule 26.4(2) – (6), and therefore

was clearly not an "unless order" within the meaning of rule 26.4, and not treated as such by the trial Judge. It did, however, make provision for the consequences of failure to comply with the order. The purpose of such an order is not to punish litigants or their Attorneys, but to ensure the efficient and just disposition of matters before the Court.

[13] Rule 26.7(2) provides for a party in default to apply for relief from sanctions, which the Appellant did by his notice of application filed on March 7th 2003. This application was heard by Baptiste J on March 21st 2003, but the application for relief from sanctions does not appear to have been addressed in the order. It is not clear whether this was an oversight. However the Appellant does not appear to have pursued this application and obtained relief, and therefore on the face of it the order of February 14th would have effect as provided by the said rule. Notwithstanding that, the Appellant proceeded to file and serve his witness statement without having obtained an order for relief from sanctions, the Respondent took no objection even when approached in writing shortly before the trial date to address and resolve any pre-trial issues, but raised the matter without notice at the trial.

[14] It seems to me that, the application for relief from sanctions filed on March 7th having not yet been disposed of, was still a live issue which the Appellant was free to pursue even at that point in the trial when Counsel for the Respondent sought an order striking out his statement of case, particularly in the face of his having sought to resolve any pre-trial issues with the Respondent in advance of the trial.

[15] Notwithstanding that the filing and service of the witness statement of Alvin Shidlowski out of time without an order for relief from sanctions was therefore irregular, nevertheless the Respondent had ample notice of it, was not taken by surprise, could and should have raised the issue ahead of the date of trial, but sought instead to take advantage of a technical breach, a reversion to the technique of trial by ambush which the CPR seeks to discourage.

[16] By failing to respond to the Appellant's letter concerning settlement of pre-trial issues, or to raise the issue of irregularity in filing the witness statement without an order of the Court prior to the date of trial notwithstanding the Appellant's Attorney's invitation to resolve any outstanding pre-trial issues, the Respondent may be taken to have waived the irregularity and lulled the Appellant's Attorney into acting on that basis. The Respondent should not be allowed to benefit from this behaviour.

[17] It seems to me that the trial Judge ought to have considered the Appellant's application for relief from sanctions pursuant to Rule 26.7, which had been filed on March 7th, when considering the Respondent's application to strike out the Appellant's statement of case. This he evidently did not do.

[18] It is the duty of the Court in exercising any discretion or applying any rule to seek to give effect to the overriding objective of the Rules, which is not, as Counsel for the Respondent has urged, to comply with the Rules, but rather to deal with cases justly. Applying that principle as stated in rules 1.1 and 1.2, I would order, as I now do, that the irregularity in filing the witness statement and related documents on the part of the Appellant be deemed to have been waived by the Respondent, and that the witness statement and related documents be admitted and the Appellant be permitted to call that witness to give evidence at the trial.

[19] The trial Judge made an order for costs, but has not indicated on what principles he based the order, or how he quantified the costs. The order was made in the course of the trial, and would not of itself have added more than marginally, if at all, to the cost of the litigation, and I can think of no justification for making a separate order for costs on that issue in the circumstances. In any event, given the order which I have made in this matter, the order for costs made by the learned trial Judge cannot stand.

[20] In the circumstances the Judge's order for costs is set aside, and the Respondent is ordered to pay the costs of this appeal, in the sum of $750.00.

Brian G.K. Alleyne
Justice of Appeal