

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2007/017

BETWEEN:

NEXT LEVEL ENGINEERING

Appellant

and

THE ATTORNEY GENERAL

First Respondent

and

ANTIGUA PUBLIC UTILITIES AUTHORITY

Second Respondent

and

WILMOTH DANIEL MINISTER RESPONSIBLE FOR PUBLIC UTILITIES

Third Respondent

and

ANTIGUA POWER COMPANY LTD

Fourth Respondent

Before:

The Hon. Sir Brian Alleyne, SC
The Hon. Mr. Hugh A. Rawlins
The Hon. Mde. Ola Mae Edwards

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC, with him Mr. John Fuller for the Appellant
Mr. Justin Simon, QC, Attorney General in Person and for the Third Respondent
Mr. Gerald Watt, SC, with him Dr. David Dorsett for the Second Respondent
Mr. Dane Hamilton, QC, with him Mr. Dane R. Hamilton Jr. for the Fourth Respondent

2007: December 4;
2008: July 14.

Application for leave to apply for judicial review – judge dismissing the claim for judicial review on the substantive issues in the claim at the leave hearing – no specific decision granting or denying leave to apply for judicial review nor directions for the trial of the substantive issues – Rule 56.4(10) of CPR 2000

DECISION

[1] **RAWLINS, J.A.:** This is the brief decision and order of the court. This court considered the appeal herein, which the appellant brought against a decision which Thomas J gave on 18th June 2007. That decision was reflected in the order, which was in the following terms:

1. The application by the claimant for judicial review is dismissed.
2. The claimant must pay the defendants' costs either to be agreed or in default of agreement in accordance with Part 65.5 of CPR 2000.

The learned judge made this order on the hearing of an application by the claimant/appellant for leave to apply for judicial review. The application was made in relation to decisions by the second and/or third respondents concerning a purported joint venture/BOOT agreement purportedly entered into between the second and fourth respondents for the use and acquisition of generators.

[2] This court heard oral submissions on 4th December 2007 and acceded to a request by counsel for the appellant for time to permit the appellant to provide further written submissions. Counsel for the appellant subsequently informed the court that they were not minded to make the further submissions.

[3] This court, having considered the written submissions which counsel for the parties filed prior to the hearing of the appeal, as well as the oral submissions, has decided to allow the appeal.

- [4] The appeal is allowed on the ground that the learned trial judge erred when, on the hearing of the application for leave to apply for judicial review, he proceeded to hear and decide the substantive issues in the action contrary to rule 56.4(10) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("CPR 2000"). Rule 56.4(10) requires a judge on hearing a leave application to direct when a first hearing, or, in the case of urgency, the full hearing of the claim for judicial review is to take place if the judge grants leave to apply for judicial review. In giving such directions the learned judge would have had the opportunity to decide whether it was necessary to order disclosure/discovery. He would also have had the opportunity to canvas the opinions of counsel as to whether it was necessary to have deponents cross-examined. A decision on this was particularly necessary given the nature of the affidavit evidence by then filed. In his judgment the learned judge made adverse findings on that evidence notwithstanding that there was no opportunity to cross-examine the deponents.
- [5] This court finds that the learned judge erred, in the first instance, when he did not make a clear determination whether leave to apply for judicial review was granted before proceeding to determine the merits of the issues raised in the claim. Had the judge granted leave, he should then have given the directions for the full hearing as required by rule 56.4(10) of **CPR 2000**, in which hearing the parties were likely to be given the option to cross-examine deponents given the contentious nature of the affidavit evidence.
- [6] In relation to the issue of costs in these proceedings, this court has further decided that inasmuch as the appellant has prevailed in this appeal, and, further, that there are no circumstances under rule 56.13(6) of **CPR 2000** that indicate that the appellant should not have its costs, the respondents shall meet the appellant's costs in the High Court and in this court.

[7] In the foregoing premises, the order on this appeal is as follows:

1. The appeal is allowed, and, consequentially, the judgment which His Lordship the Honourable Justice Thomas delivered on the 18th day of June 2007 is hereby set aside and the case remitted to the High Court for a rehearing of the application for leave to apply for judicial review as a matter of urgency.
2. The respondents shall meet the appellant's costs in these proceedings to be assessed on the basis of rules 65.11 and 65.13(b) of **CPR 2000**.

[8] This court apologizes to the parties for the inordinate delay in giving this decision.