

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2007/042

BETWEEN:

[1] ST. LUCIA ESTATES LIMITED
[2] JOSEPH PONDEXTER

Appellants

and

JAMES CURRY

Respondent

Before:

The Hon. Justice Denys Barrow

Justice of Appeal

On Written Submissions of:

Peter Foster and Associates for the Appellant

No submission for respondent

2008: June 24.

DECISION

[1] **BARROW, J.A.:** This appeal is from the refusal of Cottle J, on 21st November 2007, to vary an Order that Edwards J, made on 4th April, 2007.

[2] In brief, it was agreed on a hearing before Edwards J, that the 1st defendant in the underlying action, the present first-named appellant, should be wound up, that the shareholders list is to be settled and that a liquidator is to be appointed. There are four (4) defendants in that action.

[3] On 21st November 2007 Cottle J refused an application by the appellants to vary the order of Edwards J. The variation the appellants sought was to add to the order a further limb that all litigation in the underlying action was to be discontinued. The premise of the appellants claim to such a variation was that the order that the court made was made by

consent and their consent was predicated on their understanding that the entire action would be discontinued.

- [4] On the hearing of the application for a variation before Cottle J a transcript of the proceedings before Edwards J was produced and the appellants sought to show by reference to it that the Judge made the order on the basis that the entire action would be discontinued. The respondent's counsel sought to show to the contrary and that the proposed order was intended to address only the litigation in relation to the company and not the issues in litigation as between the respondent/claimant and the other three (3) defendants. Counsel for an interested party, Mr. Bota Mc.Namara, told the court that he, also, was of the view expressed by counsel for the respondent.
- [5] It was an inherently difficult application the appellants made, in seeking to have one judge vary the order of another judge. Perhaps a better course would have been to first apply for reasons in writing, indicating through the Registrar of the High Court that both sides needed clarification whether the judge had intended to order the entire action discontinued or only the action against the company.
- [6] Perhaps instead of an order to vary the appellants should have applied for a further order for discontinuance based on their allegation that the parties had consented to a total discontinuance. Or perhaps for a case management order (It does not matter if CPR 2000 does not apply to this litigation) identifying or limiting the issues, if any, for further litigation.
- [7] These are only incidental thoughts as to how this matter could have proceeded and may yet proceed. I mention them as possibilities for future guidance because I am quite satisfied that the appellants cannot succeed on appeal and, thus, cannot get the variation they seek. They cannot succeed because the matter has to end with the following statement made by Cottle J in refusing the application for variation, at pages 18 and 20 of the Transcript of Trial Proceedings of 21st November 2007:

"All right, this is fairly simple for me. What I have here is a Court Order, you want it varied, you have to convince me that there are good grounds to vary it. I am not

quite sure that you have so convinced me. I am operating at a serious disadvantage in the sense that I wasn't there when these discussions took place, and the transcript is not, to my mind, clear enough. So that in those circumstances, I'm simply going to have to leave the Court Order as it is and not vary it. "

[8] At page 20, the Judge said:

"For me to go behind that consent that he [the second defendant] apparently gave them, I would have needed to be, I would have needed clear evidence that, that basis was wrong, and I'm not satisfied by what I've heard today or I've read on the affidavits or the transcripts that, that is the case, and it was for that reason that I do not accede to your application to vary the Order"

[9] Even if I were to disagree with Cottle J as to the correct interpretation to put on what transpired before Edwards J, and I do not, I am quite unable to say that he reached a conclusion that was wrong on any basis.

[10] Accordingly, I dismiss the appeal with no order as to costs, since the respondent took no part in this appeal.

Denys Barrow, SC
Justice of Appeal