

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 29 OF 2006

BETWEEN:

GREAT NORTHERN INSURANCE COMPANY LIMITED

Appellant

and

[1] JENNIFER FEVRIER

[2] MARCEL FEVRIER

Respondents

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

Appearances:

Mr. Bota McNamara for the Applicant

Mr. Al Elliott for the Respondents

2006: December 19;

2007: January 5.

JUDGMENT

- [1] **BARROW, J.A.:** On 1st February 2006 Mason J ordered that a judgment debt "in Claim Number 313 of 1989 be attached to the Great Northern Insurance (St. Lucia) Company Limited in respect of the first and second named defendants", that payment of the debt be made by a stated date and that should payment not be made the Registrar of Insurance "be hereby ordered to garnish the deposits of the said" company. That order (the attachment order) was entered on 23rd February 2006.
- [2] No one was present at the hearing on behalf of Great Northern (the company) when the application dated 6th December 2005 (the attachment application) was heard and the

attachment order was made. The company became aware of the attachment order on 23rd February 2006.

- [3] On 7th March the company filed an application (the March application) in the High Court proceedings asking for (1) declarations that the company had been improperly joined as the third-named defendants in claim number 313 of 1989 (the claim) by virtue of the attachment application and that no other order could be made in the claim and (2) orders that the attachment order "be vacated and struck out", the claimants pay costs, a wasted costs order be made against the solicitors for the claimants and that time for service of that application be abridged.
- [4] In an order made on the hearing of the March application on 9th October and entered on 16th October 2006 (the October order) Mason J stated "this Court is now functus as regards to this matter" and "The matter should proceed via an appeal of the order to the Court of Appeal."
- [5] On 16th October the company filed an urgent application to stay proceedings and on 20th October, before Redhead J, a consent order was made. By that order the company withdrew its application on condition that it pay a certain sum into escrow and the attorneys at law for the claimants undertook to take no further action "until the determination by the Court of Appeal in this matter."
- [6] On 9th November the company filed an application asking for "relief from sanctions and an extension of time [to] be granted to the appellant to file the Notice of Appeal" and for this court to clarify whether or not the intended appeal was a procedural appeal for which leave must first be obtained.
- [7] In the draft Notice of Appeal that accompanied the last mentioned application (the extension application) the company seeks to appeal both the attachment order of 1st February 2006 and the October order of 9th October 2006.

- [8] In the affidavit in support of the extension application the representative of the company deposed that instead of appealing the attachment order it applied to set aside that order pursuant to part 11.18 of the **Civil Procedure Rules 2000 (CPR)**. That rule allows a person who was not present when an order was made to apply within 14 days to set aside the order. Rule 11.18 (3) mandates that such an application must be supported by evidence on affidavit showing a good reason for failing to attend the hearing and that it is likely that had the applicant attended some other order might have been made.
- [9] Counsel for the company accepted that the March application did not mention rule 11.18 but argued that an application does not need to specify the rule pursuant to which it is made. It seems to me not only did the application not indicate it was being made pursuant to rule 11.18 but as a matter of substance it did not invoke the jurisdiction of the court, under that rule, to set aside. The March application sought declarations and consequential orders in relation to the attachment order similar to what would be sought on appeal. Nowhere in that application does it appear that the company was applying to set aside an order made in its absence so that it could be heard on the application that had been heard in its absence.
- [10] It was argued for the company that the affidavit in support stated that the company was not served with the application for the attachment order, which raised the matter of its absence when the attachment order was made and satisfied the requirement of showing good reason for failing to attend. It is true that the affidavit so stated. It may also be argued, in relation to the second requirement, that the affidavit contained material from which it can be argued that had the company been heard on the application for the attachment order the court would not have made the attachment order.
- [11] As against these arguments stands the fact that the October order clearly did not determine an application to set aside pursuant to rule 11.18 but determined that the court could not entertain the application for declarations and consequential orders. It is inescapable that it was in relation to the orders sought in the March application that the

court pronounced itself to be functus, meaning, as I understand it, that the court had no jurisdiction to make such orders because, having made the attachment order, it had performed its function and had no jurisdiction to perform any further function. The court did not pronounce itself functus in relation to a rule 11.18 application by an absent party. That rule unequivocally gives the court jurisdiction to set aside its own order so it would have made no sense for the court to declare itself functus had it been asked to exercise the jurisdiction which that rule confers or preserves.

[12] Faced with a perfectly sensible explanation for the making of the October order and a perfectly senseless one, I have no hesitation in concluding that the court made the October order for the sensible reason that it understood the March application to be for orders that it had no jurisdiction to make. Looking at the March application for myself I find that it was not an application for an order pursuant to rule 11.18. I am satisfied that the court correctly pronounced itself functus as regards the application for the declarations and consequential orders that was before it.

[13] An interesting postscript to the conclusion that I have reached is provided by a look at the relief sought in the company's draft notice of appeal. If given leave to appeal, the relief that the company would seek from the court of appeal is identical in substance to the relief that the company sought from the High Court in the March application. The company would seek the same two declarations that the company was improperly joined and that no other order can be made in the claim, and the same orders to 'vacate and strike out' the attachment order and that the solicitors for the claimants be ordered to pay wasted costs. If I entertained any doubt as to the nature of the March application (and I did not) they would completely disappear with this confirmation that what the March application sought from the High Court was in the nature of appellate relief against its own order.

[14] The conclusion that I have reached satisfies me that the proposed appeal against the October order has no realistic prospect of success. The authorities are clear that leave to

appeal should be refused if a proposed appeal has no realistic prospect of success¹: Accordingly, I refuse the application for an extension of time within which to apply for leave to appeal because even if I had found there was a good explanation for the failure to apply in time for leave to appeal, I would refuse leave to appeal.

- [15] Counsel for the company raised the possibility that the proposed appeal against the October order would not be a procedural appeal and so the company would not need leave to appeal but did not really argue the point. The October order did not decide any substantive issue in the claim but decided only the procedural point that the company could not attack the attachment order by the procedure that the company used, that is, by asking the High Court to vacate and strike out its own order but could do so only by appealing to the Court of Appeal. To my mind that fact clearly made the proposed appeal a procedural appeal, which is defined in rule 62.1 (2) of **CPR 2000** to mean "an appeal from a decision of a judge, master or registrar which does not directly decide the substantive issues in a claim..." I confirm, therefore, that the proposed appeal could only be brought if leave to appeal were first obtained.
- [16] For the sake of completeness I mention two other aspects. Firstly, the contention that the attachment application was not served is now accepted to be unsustainable. The claimants had filed an affidavit of service (which counsel for the company now accepts had been properly filed in the registry) proving that it had served the attachment application. Secondly, I am satisfied that the present application for an extension of time to appeal the attachment order, made eight months after it was entered, was made far too late to be capable of satisfying the mandatory requirement of rule 26.8 (1)(a) of **CPR 2000** that such an application must be made promptly. Counsel for the company argued long and hard but could not get past the fact that the affidavit in support of the present application for an extension of time for appealing contained no good explanation for the failure of the company to apply for leave to appeal in proper time, which rule 26.8 (2)(b) **CPR 2000** makes a pre-condition to the court granting relief from sanctions; see **Dominica**

¹ *Othniel Sylvester v Faellseje, A Danish Foundation* - St. Vincent & The Grenadines Civil Appeal No. 5 of 2005, Judgment delivered February 20, 2006 & *First Caribbean International Bank (Cayman) Ltd v Henry R C Starkey* - British Virgin Islands Civil Appeal No. 23 of 2005 - Judgment delivered January 11, 2006.

Agricultural and Industrial development Bank v Mavis Williams.² The explanation offered was that the company chose to make an application pursuant to rule 11.18 instead of appealing. In my view, had the company done so it would have done the right thing. But as I have found, it did not: it neither appealed nor applied to set aside the attachment order.

[17] I award the costs of this application in the sum of \$1,000.00 to the respondents.


Denys Barrow, SC
Justice of Appeal

² Dominica Civil appeal No. 20 of 2005 at paragraph [19]; judgment delivered 18 September 2006.