

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.23 OF 2005

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK [CAYMAN] LIMITED

Applicant

and

HENRY RC STARKEY

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

On Written Submissions:

Harney Westwood & Riegels for the Applicant

Farara Kerins for the Respondent

2006: January 11.

JUDGMENT

- [1] **BARROW, J.A.:** The applicant seeks an extension of time within which to apply for leave to appeal the order for costs that the Master made when she decided, as a preliminary issue, that the applicant's claim was statute barred and proceeded to dismiss it. The Master ordered the applicant to pay prescribed costs, which are said to amount to \$27,976.83.
- [2] Two attacks are planned if time is extended to allow the applicant to apply for leave to appeal. It is convenient to consider the substance of these contentions that would be advanced on the intended application for leave to appeal and by-pass, for now, the first hurdle, which is that the time for seeking leave to appeal has already expired.

- [3] The applicant would contend that the master delivered her decision when counsel for the applicant was absent due to counsel being otherwise engaged. Counsel is said to have sought to get the delivery of the decision deferred until counsel could be present. The Master did not apparently accede to the communicated request but proceeded to deliver her decision and counsel submits this amounted to a denial of natural justice.
- [4] That contention is the fall-back attack because the principal attack is that the master erred in law when she refused, on the basis that she was *functus officio*, counsel's application that the master should revisit her costs decision.
- [5] It is sufficient to dispose of this latter attack by observing that not a single basis is identified for the contention that the master erred in refusing the application when she concluded that she had exhausted her judicial function and no longer had jurisdiction to deal with the matter. There is not the slightest clue as to the argument that the applicant would put forward to support the contention.
- [6] As counsel identified in her written submission, leave to appeal will only be granted when an applicant shows that the intended appeal has a realistic prospect of success: **Othniel Sylvester v Faelleseje, A Danish Foundation**¹. As a starting point, the court needs to know if there is an argument capable of being advanced. Here, there is nothing so there is simply no basis upon which the applicant can establish that the intended appeal has any prospect of success whatsoever, far less a realistic one.
- [7] One infers the argument in the applicant's written submissions that the master, having allegedly denied natural justice to the applicant, was thereafter at liberty to revisit the matter and to correct the alleged breach. I would have thought that that was clearly the function of an appellate tribunal. It is true that there are circumstances in which a judgment that was given at a trial that has been conducted in the absence of a party may be set aside by the tribunal which

¹ Judgment delivered February 20th 2006 Saint Vincent & The Grenadines - Civil Appeal No.5 of 2005

conducted the hearing; see rule 39.5 of **Civil Procedure Rules 2000**. However, one of the pre-conditions to making such an application is that it must be made within 14 days; here, the applicant made its application 99 days after the hearing and so was far out of time. That makes it unnecessary to consider whether this rule, or an adaptation of it, is available to found an application to set aside the pronouncement of a decision, which was made after a fully contested hearing had been held.

[8] The fallback attack, that it was a breach of natural justice for the Master to have delivered her decision in the absence of counsel, contains the hidden premise that it was the obligation of the Master to adjust the order in which she performed her judicial function to accommodate the prior engagements of counsel. It is sufficient to say simply that any accommodation that practitioners may seek from a judge has to be a matter for the judge's discretion and the exercise of that discretion will not be disturbed unless it can be shown that the judge exercised her discretion upon wrong principles and was plainly wrong: **Michel Dufour et al v Helen Air Corp. Limited**².

[9] In relation to this contention it is again the case that the submissions for the applicant contain not a single basis for saying that the master wrongly exercised her discretion by deciding to deliver the decision on the date of which counsel had been notified. In relation to this ground, the conclusion is the same as that stated above: there is simply no basis upon which the applicant can establish that the intended appeal has any prospect of success whatsoever, far less a realistic one.

[10] It follows that no point would be served by granting the application for an extension of time to apply for leave to appeal because the intended application for leave to appeal is bound to fail. Costs of US\$750.00 to be paid by the applicant to the respondent.

Denys Barrow, SC
Justice of Appeal

² [1996] E.C.L.R. 95