

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2004

BETWEEN:

ULYSSES AUGUISTE

Plaintiff

and

**[1] DAVID ROBIN
[2] VIRGINIA PETERS**

Defendant

Before:

The Hon. Mr. Brian Alleyne, SC

Justice of Appeal

Appearances:

Mrs. Francine Baron-Royer for the Appellant

Mr.B. McDonald Christopher for the Respondent

2004: July 15;
July 22. [Re-issued]

JUDGMENT

[1] **ALLEYNE, J.A.:** This is an application by the intended Appellant Ulysses Auguiste for an order that he may be at liberty to appeal an order made at a case management conference by Master Brian Cottle on 5th December 2003 notwithstanding that the time limited for so doing has expired. Notice of Appeal was filed without leave on 27th January 2004, and the application for leave to file out of time was filed on 4th February 2004.

[2] The order against which the intended Appellant seeks to appeal is an interlocutory order by which the learned Master ordered that the claim against the intended Appellant, the first defendant in a claim for damages for negligence in a 'running

down action', 'is to continue to determine the issue of contributory negligence and assessment of damages.' The intended Appellant seeks to appeal against this decision on the grounds that the learned Master erred in law in making the order complained of, and misdirected himself when he exercised his powers on his own initiative under Part 26.2 of the Civil Procedure Rules 2000 (CPR). The intended Appellant seeks to reserve the right to add to these grounds.

[3] The intended Appellant and the Respondent have both proceeded on the assumption that the time for filing notice of appeal in this case is 42 days, and it is also apparent that they have both assumed that this appeal may proceed without leave. These assumptions are both in my view erroneous. The appeal, applying the 'application test' which has been declared by this Court to be the appropriate test, is an appeal from an interlocutory order, in that the application, such as it was, would not have, and indeed the order did not dispose of all of the substantive issues in the case. An appeal from the order is therefore by leave only.

[4] The intended appeal would, in addition, fall within the definition of a procedural appeal as defined by Part 62.1 of the CPR, and the time limited for filing notice of appeal, as provided by Part 62.5(a), is within 7 days of the date when the decision appealed against was made, i.e. 5th December 2003, or, as provided by Part 62.5(b), if, as in this case, leave is required, within 14 days of the date when such leave was granted. In addition, Part 62.10(1) provides that on a procedural appeal the Appellant must file and serve written submissions in support of the appeal with the notice of appeal.

[5] The issue to be determined on this application is whether, in the light of the provisions of the CPR, and in the face of the non-compliance by the intended Appellant with the time limitations therein, this Court should consider and grant the application for leave to appeal.

[6] The applicant relies on the affidavit of Francine Baron-Royer, solicitor for the applicant, in support of the application. The solicitor for the intended Respondent,

in opposition to the application, has submitted on authority that it is not proper for the solicitor who is to appear as a barrister in a cause to swear an affidavit in the same cause. It is contended that therefore there is not in this case any affidavit of merit and the application should be dismissed. It cannot be doubted that it is improper for the solicitor, who, it may be assumed, would appear as Counsel on the trial of the case, to swear an affidavit in the cause, and the practice should be firmly discouraged. However, the rule of practice does not invalidate the affidavit, which may be considered at the discretion of the Court. I would note, in this case, that the affidavit does not address the merits or facts of the substantive case but only the procedural issues concerning delay. I would therefore take account of the affidavit for what it is worth.

[7] In her submissions on the application for leave to appeal notwithstanding that the time limited for so doing has expired, the intended Appellant has drawn attention to Part 62.20(1) and 26.1 of the CPR, and contends that the making of the application after the time for compliance has passed is not an absolute bar to the application. I cannot but agree. Nevertheless, contrary to the assumptions of both parties, the delay is not inconsiderable, being from 14TH December 2003 until the application for leave was filed on 4th February 2004. What is more, the reasons given for the delay are not valid reasons.

[8] In her submissions in support of the application the solicitor for the applicant asserts that Master Cottle made the order complained of of his own motion, and that no application for such an order had been made by the Respondent. This assertion is not challenged by the Respondent. The applicant complains that no opportunity was given to make representations against the proposed order, and that the requirements of Part 26.2(2) were not observed. The effect of the order if allowed to stand would be that the applicant, the defendant in the claim, would be precluded from pursuing his pleaded assertion that the accident was caused not by negligence on his part, but by the negligence of the Claimant/Respondent. He would also be shut out from pursuing his counterclaim. This, in my view, would be

contrary to the overriding objective of the CPR and would tend to subvert the applicant's right of access to justice.

- [9] It seems to me that there are issues of fact and law to be tried in this matter, and that the parties are entitled to a reasonable opportunity to argue these issues before a Court of competent jurisdiction. Without in any way prejudging the outcome of the matter, it seems to me that there is a reasonable chance of the appeal succeeding if the applicant is granted leave to appeal, and that the Respondent would not suffer prejudice, beyond some delay in the determination of the issues, by the granting of leave. In the circumstances, and notwithstanding my view that there was some delay without valid reason given, I think that the justice of the case would be best served by granting leave to appeal, and the order is made that the applicant be at liberty to file and serve Notice of Appeal in this matter within 14 days of the date of this order. The applicant will pay the costs of this application in the sum of \$500.00 in any event.

Brian Alleyne, SC
Justice of Appeal