

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 33 OF 2003

BETWEEN:

MARIA HUGHES

Applicant/Respondent

and

THE ATTORNEY GENERAL ANTIGUA AND BARBUDA

Respondent/Appellant

Before: The Hon Mr. Michael Gordon

Justice of Appeal [Ag.]

Appearances:

Ms. Raquel Walsh Stilston with Ms. Stacey Wilson for the Applicant

Ms. Turkessa Benjamin for the Respondent

Ms. Denise Parillon who appeared for the 1st defendant in the Court below, as observer.

2004: February 3;
February 16.
April 13. [Re-issued]

JUDGMENT

[1] GORDON J.A. [Ag]: There were two applications filed by the Applicant, Maria Hughes. The first in time, filed on December 31, 2003 was an application that the Appellant's Notice of Appeal be struck out; that the Appellant do comply with the Order of the High Court dated 30th October 2003 and that the Appellant pay the costs of the application.

[2] On 30th October 2003 Mitchell J. gave a written judgment that commenced as follows:

"This is a decision on an interlocutory application in Chambers for an interim payment to be made to the Claimant Maria Hughes."

- [3] The ground of the Applicant's application to strike out the Appellant's Notice of Appeal is that the Notice had been filed some 42 days after the judgment handed down by Mitchell J and, by virtue of the fact that the appeal was a procedural appeal, was out of time and in any event required leave of the Court prior to filing.
- [4] Part 62.5 of the Civil Procedure Rules 2000 (CPR) states that a notice of appeal in a procedural appeal must be filed within 7 days of the date the decision appealed against was made. Part 62.1 (2) defines a Procedural Appeal as being an appeal from a judge, master or registrar which does not directly decide the substantive issues in a claim. There are a number of exceptions which are not relevant in this case.
- [5] Section 31 (2) of the Eastern Caribbean Supreme Court Act Cap. 143 of the laws of Antigua and Barbuda states that no appeal shall lie without leave of the judge or the Court of Appeal from any interlocutory judgment or interlocutory order given by a Judge, again with certain exceptions that do not concern this case.
- [6] Though CPR has introduced a different term, to wit 'procedural appeal', it is in my view equivalent to an appeal from an interlocutory order. Hence if the present Notice of Appeal is a procedural appeal, leave to file the appeal is a necessary prerequisite to the filing of a Notice of Appeal. CPR 62.2 lays down that where leave is required prior to filing an appeal an application for such leave must be made within 14 days of the order against which leave to appeal is sought. There is no specific rule stating within what period an application for leave must be filed, but interpreting Part 61 and 62 as a whole it is clear that an application for leave in a procedural appeal must be made within the same period as the notice of appeal must be filed where no leave is required, i.e. 7 days.
- [7] Thus, the primary issue raised by this application to strike out the Notice of Appeal is whether the appeal is a procedural appeal (an appeal from an order which does not directly decide the substantive issues in the claim) or an appeal from an order that does so decide the substantive issues.
- [8] The instant interlocutory application on which Mitchell J decided was an application for an interim payment. Orders for interim remedies is the subject of CPR Part 17, Rule 1 of

which sets out a variety of interim remedies that may be applied for, including, among others, an order for interim injunctive relief, an order for the taking of an account, and, an order for interim payment.

- [9] Part 17 Rule 5 sets out the procedure to be used when applying for an order for an interim payment and Rule 6 states the conditions that must be met to be successful in such an application. Rule 6 (1) (d) reads as follows:

“(1) The court may make an order for an interim payment only if—

(d)it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for an interim payment is sought for a substantial amount of money or for costs;”

- [10] At paragraph 16 of the judgment of the Learned Trial Judge he states the following: *“I am satisfied that if this action proceeded to trial, Ms Hughes would obtain judgment for a substantial sum. The defendants are deemed for the reasons given above to have admitted Ms Hughes claim so that if the matter went to trial she would inevitably succeed”*.

- [11] There are two methods of determining whether a judgment or order is interlocutory or final. The methods are usually referred to as the ‘order test’ and the ‘application test’. In Sylvester v. Singh¹ Byron JA (as he then was) traced the evolution of the two tests and concluded finally, that the application test was the preferred test in this jurisdiction. He stated at page 3 of the judgment: *“Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for which ever side the decision was given.”*

- [12] *Sylvester v Singh* was a case brought under the old rules of procedure. In *Pirate Cove Resorts Limited et al v Euphemia Stephens et al*², an appeal brought under CPR, the very same issue as confronts this Court came for decision. The full Court considered the matter and followed *Sylvester v Singh*.

¹ Civil Appeal No. 10 of 1992 [1995] St. Vincent & The Grenadines

² Civil Appeal No. 11 of 2002 [2003] St. Vincent & The Grenadines

- [13] Learned Counsel for the respondent argued that notwithstanding that the application was for an interim payment, the ordering of such a payment was de facto a final determination of liability *and* hence a final judgment. I do not agree. In my view, not only is there the issue of the final determination off the quantum of damages to be decided, but the question of liability is still at large. I read the statement of the Learned Trial Judge that “the defendants.... are deemed to have admitted Ms. Hughes claim so that if the matter went to trial she would inevitably succeed” as justifying the order for an interim payment, and not a final determination of liability which can only happen at trial.
- [14] I am fortified in my view when I read CPR Part 17 rule 7 (2), which gives the court the power to order the repayment of an interim payment thus highlighting the non-final nature of the order for an interim payment.
- [15] Having determined that the order of Mitchell J was not a final order and that any appeal there from would be a procedural appeal I now consider the effect of such determination. Following *Sylvester v Singh* and *Pirate Cove Resorts Limited v Euphemia Stephens* I am of the clear view that failure to get leave makes the notice of appeal a nullity. The application to strike out the notice of appeal is therefore granted.
- [16] Having decided that the notice of appeal filed by the Respondent to this application is a nullity, it is unnecessary to consider the second part of the application, that the Respondent do comply with the Order of Mitchell J to pay to the Applicant the interim payment. The applicant may proceed in the ways permitted to her to seek to enforce a money Order.
- [17] The Respondent is ordered to pay the costs of this application in the sum of \$1,000.00

Michael B. G. Gordon
Justice of Appeal [Ag.]