

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

COMMONWEALTH OF DOMINICA

Claim No. DOMHCV2019/0280

BETWEEN:

DALE DANGELBEN

Claimant / Respondent

-and-

[1] ANTHONY ASTAPHAN

[2] DARRYL TITRE

**[3] NATURE ISLAND COMMUNICATIONS CORPORATION
(KAIRI FM)**

Defendants/ Applicants (First and Second Defendant)

Claim Number DOMHCV2020/0192

BETWEEN:

DALE DANGLEBEN

Claimant/ Respondent

-and-

DARYL TITRE

Defendant/ Applicant

-and-

In the matter of an application by **ANTHONY ASTAPHAN**
and **DARRYL TITRE** for leave to appeal the order made
on July 25, 2022.

Applicants

Before Master Alvin S. Pariagsingh

Appearances: Peter Foster KC leading Lennox Lawrence and Jodie Luke instructed by
Reneé T. St. Rose for the Applicants/ First and Second Defendants;
Cara Shillingford- Marsh for the Respondent/ Claimant.

2022: November 16, 21 – written submissions

2023: January 31

DECISION

*Applicants' application for leave to appeal the order made on July 25, 2022 and
Application to extend time to apply for leave to appeal filed on October 06, 2022*

[1] **PARIAGSINGH, M:-** There are two applications before the Court. The first is an application for leave to appeal¹. On July 25, 2022 the Court gave a written decision in this matter on the application of the First and Second Defendants in the first claim. The First Defendant sought an order that the Court determine whether the words complained of were capable of having a defamatory meaning or the meaning ascribed to them by the Court. The First Defendant also sought orders striking out certain portions of the Statement of Claim.

[2] The second application arose out of the Court's inquiry of Counsel for the Applicants at the hearing on October 03, 2022². At the hearing the Court inquiring from Counsel whether the application for leave to appeal was filed within the allotted time. Following the hearing, the Applicants filed the second application seeking an extension of time to apply for leave to appeal.

DISPOSITION:

[3] For the reasons set out below, both the applications filed on August 10, 2022 and October 06, 2022 are dismissed. There shall be no order as to costs on the application filed on August 10, 2022 and the Applicants shall pay the Respondent's costs of the application filed on October 06, 2022 to be assessed by this Court in default of agreement within 28 days from today on the application of either party.

PARTICIPATION OF THE RESPONDENT:

[4] On August 15, 2022 the Court through the Deputy Registrar indicated to both parties that having read the application for leave to appeal it was minded to have the application served on Respondent and give directions for an inter partes hearing. The Court requested a response by the next day. Attorney at Law for the Claimant replied to the Court's email on the same day and indicated that there was no objection to such an order being made by the Court. By letter dated August 16, 2022 (delivered to the Court

¹Filed on August 10, 2022

²Filed on October 06, 2022

on August 17, 2022) the Applicants' Attorneys wrote to the Registrar adopting the position that the hearing can be without notice and that they can make themselves available for a hearing on short notice. The authority of **Cage St. Lucia Ltd v Treasure Bay (St Lucia) Ltd**³ was provided to the Court.

[5] Having considered this authority, the Court fixed the application for leave to appeal for hearing without notice to the Respondent. The matter came on for hearing on October 03, 2022 and the issue of whether the application was out of time was raised by the Court. Prior to this, there was no intimation by the Applicants that the application was out of time. Upon the issue being raised Counsel for the Applicants sought the opportunity to file the second application.

[6] The second application was brought to the Court's attention shortly after filing and an order was made in chambers giving directions that the application be served on the Respondent and he be permitted to file any affidavit in opposition and make submissions.⁴

EXTENSION OF TIME:

[7] An application for leave to appeal an interlocutory order must be made within 14 days of the date of the order.⁵ All time periods set out in the rules are expressed as 'clear days'.⁶ In determining clear days the day on which the period begins and ends are not counted.⁷ That means July 25, 2022, the day the order was made is not counted. Time began to run from July 26, 2022. The last day of the period which is also not counted was on August 08, 2022. The application had to be filed within this time to comply with the relevant rule. This application was filed on August 10, 2022. This is in breach of rule

³HCVAP 2011/045

⁴ Order dated October 18, 2022

⁵ CPR r62.2 (1) - Where an appeal may be made only with the leave of the court below or the court, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought.

⁶ CPR 3.2(2) - All periods of time expressed as a number of days are to be computed as clear days.

⁷ CPR 3.2(3) - "clear days" means that in computing the number of days the day on which the period begins and the day on which the period ends are not included.

62.2(1) CPR. No doubt the Court has jurisdiction to extend or shorten the time for compliance with any rule or practice direction.⁸

[8] The test for the grant of an extension of time to appeal was set out by the Court of Appeal in **Grant et al v Tanzil**⁹ at paragraph 17 by Pereira CJ:

'The granting of an extension of time is discretionary. The principles governing the exercise of the discretion to extend time are also trite, having been stated and restated in several decisions of the Court dating back from the early days of the introduction of the CPR in **Rose v Rose** in 2003. Those principles were restated by me in **Carleen Pemberton v Mark Brantley** and endorsed in the later decision of the Court in **C.O. Williams Construction (Saint Lucia) Limited v Inter-Island Dredging Co. Ltd.** The court, in exercising its discretion, in giving effect to the overriding objective of ensuring that justice is done between the parties, undertakes an evaluation exercise by weighing all the relevant factors in the scale. These factors would normally include: (i) **the nature of the failure and the consequential effect;** (ii) **the length of the delay and whether any good explanation has been put forward for excusing it;** (iii) **weighing the prejudice to the parties in the context of the failure and the delay;** and (iv) **importantly in this case, where an extension is sought to seek leave to appeal, whether the appeal has a realistic prospect of success.** Our analysis of these factors is set out below.'

Nature of the failure

[9] An appeal from an interlocutory order is grounded in statute.¹⁰ The trigger of that right in the case of an interlocutory appeal is the grant of leave to appeal. The application for leave is governed by the procedure set out in the rules. The rule which there was a failure to comply with was rule 62.2(1) CPR. There is no express sanction stated in this rule. The nature of the failure is that the Applicants did not trigger the procedure to access their statutory right on time.

⁸ CPR r. 26(1)(k), (w) and the inherent jurisdiction of the Court.

⁹ SKBHCVAP2020/0004

¹⁰ Section 30 (2)(g) of the Eastern Caribbean Supreme Court (Dominica) Act Chap 4:02.

Effect of failure

[10] The failure to file an application for leave to appeal in time renders the application a nullity.¹¹ This incidentally disposes of the first application in its entirety if the second application is not determined in the Applicants favour.

Delay:

[11] The Applicants have only addressed delay within a 72 hour window. This is the period between when the application came on for hearing and when the second application was filed. There is no explanation of the delay from the date when the application for leave to appeal ought to have been filed to the date when the application to extend time was filed.

[12] The Applicants do however contend that the reasons for the decision was received on July 28, 2022. That is factually incorrect. The Court's decision and order was delivered in Court on July 25, 2022. At that hearing all parties to the application were represented by Counsel. Further, the First Defendant was personally present when the order was made.

[13] When the decision was delivered in Court a copy of the Court's written reasons was circulated to Attorneys for both parties on the same day. The decision was disseminated to all Attorneys by the Court through the Court Clerk on the day of delivery, July 25, 2022 at 1:59pm via email. Attorneys were invited to indicate to the Court any errors or matters of editing that they wished to be considered by 12 noon the following day. There was no response to the Court from the Applicants' Attorneys. Accordingly, the Deputy Registrar signed the reasons, unchanged, providing them to the parties on July 28, 2022. All parties had notice of the order and reasons of the Court on July 25, 2022.

¹¹ Paragraph 18 of Grant et el v Tanzil (Supra)

[14] Notwithstanding the above, it is irrelevant when reasons were provided in the context of this application. Reasons are not appealed, orders are. The order was made on July 25, 2022 and that is the day for the purpose of CPR 66.2 that is relevant. The order was effectual when it was made in Court on July 25, 2022 and not on any other day.¹²

[15] The Respondent submitted that the delay is 57 days. That is the time between when the application ought to have been filed and when the application was made. The Respondent submitted that this delay is not 'marginal' as the Applicants submit.

[16] In my view, the delay in making the application has to run from the date on which the application ought to have been made, that is August 09, 2022 at latest. It cannot in my view run from when the Court brought it to the attention of the Applicants that the application was out of time. The submission by the Applicants that they were granted leave to file the second application is erroneous. Firstly, the order itself does not grant leave to file any application and secondly, no leave was required.

[17] The authorities have settled that delay is contextual and must be explained. The Applicants have not explained the delay. On this limb, the Applicants fail.

Reason for breach:

[18] The Applicants have put forward as their reason for the breach, a miscalculation of the time by Counsel. The authorities are abundant and consistent in saying that this is not a good reason in the context of extension of time applications. The dicta of Edwards JA (as she then was) in **Laudat & Ors v Ambo**¹³ is a pellucid statement of the Court's posture to failure of Counsel as an excuse. The Court said:

'Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice

¹² CPR r. 42.8 - A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date

¹³ DOMHCVAP2010/0016

direction where the explanation given for the delay is misapprehension of the law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.'

Prejudice:

[19] The prejudice in this application being refused is obvious. The Applicants will not be able to pursue their intended appeal. They do however, notwithstanding the decision of this Court, have the opportunity to apply to the Court of Appeal.¹⁴ The prejudice to the Respondent if the application is granted is a delay in the progression of this matter. The Respondent submits that it ought not to be prejudiced on account of an unexplained delay. I agree. In my view the balance of prejudice lies in favour of the Respondent. The Applicants have not acted with due diligence in making the application for leave to appeal or even making the application to extend time. The application to extend time was promoted by the Court raising the issue and not by any frontal assertion by the Applicants.

Realistic prospect of success:

[20] In **Othneil Sylvester v Faellseje, A Danish Foundation**¹⁵ the Court of Appeal stated:

'The appellant needs to show that the intended appeal has a real prospect of success, **which is a heavier burden than showing only that he has an arguable appeal**, according to the view, which I respectfully adopt, of the English Court of Appeal in *ED&F Man Liquid Products Ltd. V Patel* [2003] EWCA Civ 472. But in addition, because he seeks to appeal against the exercise of a judicial discretion, he needs to show a real prospect that he will be able to persuade the appellate court that the master's decision did "not consider the case to be sufficiently plain and obvious to warrant striking out at this stage", was clearly or blatantly wrong'

[21] A 'real' prospect of success was defined by Lord Wolf in **Swain v Hillman**¹⁶ as meaning that the prospect of success must be realistic rather than fanciful.

¹⁴ Rule 62.2(1)(A) CPR

¹⁵ Civil Appeal No. 5 of 2005

¹⁶ [2001] 1 All ER 91

[22] An application for leave to appeal must set out the proposed grounds of appeal.¹⁷ The Applicants have listed five (5) proposed grounds of appeal in their application. These are:

1. The learned Master erred in fact and in law and or misdirected himself as to the facts and law when he determined the correct version of the words complained of **without hearing the parties** on the issue.
2. The learned Master erred in fact and in law and or misdirected himself as to the facts and law when **he failed to hear the First Defendant and or the parties** on the audio recording before arriving at his decision.
3. The learned Master erred in law when he **failed to give consideration to the further affidavit filed on behalf of the First Defendant on 22nd July 2022** further to the learned Master's **request for the audio.**
4. The learned Master erred in fact when he **failed to give consideration to the entire interview in arriving at his finding** that the words were capable of a defamatory meaning.
5. The learned Master erred in fact and in law when he found that the words complained of were capable of bearing a defamatory meaning.

Failed to hear the Applicants:

[23] Grounds (a) and (b) deal with failing to hear the Applicants and can be dealt with together. This ground has no realistic prospect of success for the following reasons:

1. This ground is factual. In the affidavit in support of the application, the Applicants accept that at the hearing on July 20, 2022 the Court requested the audio recording of the alleged defamatory interview. This request was

¹⁷ CPR r. 62.2 (2) - The application for leave of appeal must be made in writing and **set out concisely the grounds of the proposed appeal**

made by the Court after the Court drew to the parties' attention that the Court could not determine if the words are capable of having a defamatory meaning without first resolving the disputed fact of what were the actual words spoken.

2. The application was heard on June 27 and decision reserved to be delivered on July 25, 2022. On the instructions of the Court, the matter was relisted on July 20, 2022 five (5) days before the decision was delivered. This hearing was convened to indicate to the parties that the Court could not resolve the dispute as to the alleged defamatory words. By an email sent by the Court Administrator on Monday July 18, 2022 at 4:07pm both parties were notified that the matter was being re-listed on July 20, 2022 to discuss certain issues.
3. At the hearing on July 20, 2022 the Court requested that an audio recording of the alleged defamatory interview be **provided by either party** to allow the Court to listen to the audio and resolve whose version of the words was correct. As with the hearing on June 27, 2022 at the hearing on July 20, 2022, the Applicants were represented by Counsel on that day. No objection was taken to this course being adopted by the Court or even to the Claimant providing the audio recording.
4. On July 20, 2022 at 10:03 am Attorney at Law for the Claimant provided an audio recording to the Court via email. This email was copied to three (3) of the four (4) Attorneys representing the Applicants. No communication was made by or on behalf of the Applicants that they wished to be further heard on any issue, specifically to address the audio recording or its use between the second hearing on July 20, 2022 or July 25, 2022 when the matter was fixed for decision.

5. On the day of the decision, July 25, 2022 the Applicants were represented by Counsel. The First Defendant was present. No indication was made that there was any objection or issue with the audio being used to determine the words spoken. In those circumstances, the Court delivered its decision.
6. A litigant is entitled to a fair hearing. A fair hearing affords a party the opportunity to properly put forward his/ her case in keeping with the rules of natural justice, the rules of Court and the relevant statutory provisions.
7. In my view, the Applicants had ample opportunity to put forward any arguments he wished to make regarding the use or contents of the audio. He did not. The parties were heard on the application and re-heard on the use of the audio. After the audio was provided, the Applicants still had the opportunity to indicate any issue with same on July 25, 2022 before the decision as delivered. He did not. Accordingly, I find no merit in these grounds of appeal with any reasonable prospect of success to warrant the grant of leave to appeal.

Failed to give consideration to the affidavit filed on July 22, 2022:

[24] The Applicants contend that the Court failed to give consideration to the Affidavit filed on July 22, 2022. The affidavit filed on July 22, 2022 was considered by the Court. It formed part of all the documents filed. The affidavit was of no assistance to the Court and for that reason was not referenced in the written decision.

[25] The Court had already indicated its intention to listen to the audio recording and determine what were the words spoken. There was no objection to this course by either party. There was no permission sought or granted for the Applicants to file any further evidence or a 'revised' transcript.

[26] The Applicants did not comply with the Court's request to provide an audio of the interview. Neither has they ever challenged the audio provided by the Claimant. Instead

what they sought to do was to file an affidavit, without leave. This affidavit purports to be from the stenographer who prepared their first transcript. A “revised” transcript was exhibited to this affidavit. Having listen to the recording multiple times, with the greatest of respect to Counsel and the stenographer, it is still incorrect. I was and still am of the view that affidavit filed on July 22, 2022 was irrelevant and as such it was not specifically mentioned in the decision of July 25, 2022.

[27] In my view the fact that specific reference was not made to the affidavit in the decision is of no moment. If the Applicants are contending that the affidavit was ignored the onus was on them to put evidence in their application to rebut the assumption that all material filed was considered. This was not done. This position as enunciated by Baptiste JA in **Jhawnie Gage et al v The Attorney General of Dominica**¹⁸ where the Court stated:

‘In advancing the position that the learned judge did not take the reply submissions into account, Mrs. Dyer-Munro seems to have embarked upon an impermissible, over-zealous dissection of the language of the judgment and conducted a narrow textual analysis which enabled her to advance the view that the learned judge ignored it. The position is that the learned judge had the entire record before her and in the absence of compelling evidence to the contrary, consistent with the authorities, the assumption is made that she took the reply submissions into account. It cannot be implied that by not mentioning the reply submission, the learned judge must have forgotten or ignored it. The judgment does not lend itself or give rise to a reasoned belief that the learned judge forgot or ignored the reply submissions. It was clear what were the judge’s decision on the critical issues and why she reached her conclusion. The judge’s decision was rationally supportable.’

[28] I also find no reasonable prospect of success to warrant the grant of leave to appeal in this proposed ground.

Failed to consider the entire interview:

[29] Paragraphs 18 to 21 of the Court’s decision delivered on July 25, 2022 speaks about the objective meaning of the words spoken in the context of the entire interview. This is

¹⁸ DOMHCVAP2020/0005 at paragraph 86

the clearest indication that the entire interview was considered. Further in the footnotes to the decision of the Court the actual times during the recording when the statements were made are specifically identified out of the entire interview. It was highlighted in the decision that at the stage of determining the question of law, whether the words spoken were capable of being defamatory, attention is paid to the words spoken. At this stage, the Court is only concerned with the legal question. The Court is not determining whether the words spoken were in fact defamatory. No doubt, at the trial the trial judge will consider the words spoken in the context of the entire interview in more detail.

[30] Accordingly, I find no merit in this ground of appeal with any reasonable prospect of success to warrant the grant of leave to appeal.

Erred in fact and law in holding that the words complained of were capable of bearing a defamatory meaning:

[31] Professor Stuart Sime in **A Practical Approach to Civil Procedure**¹⁹ states:

‘The grounds of appeal must identify as concisely as possible why the decision was wrong or unjust; Perotti v Collyer – Bristow [2004] 4 All ER 53 at [37] and [40]. To do this, specific incidents, directions, or findings made by the court below must be identified which are alleged to be wrong or unjust through serious procedural or other irregularity. Each ground should be stated as an appeal on a point of law or against a finding of fact.’

[32] This ground is a generic ‘cover all’ ground which no true interrogation can be made to determine where there is any realistic prospect of success. It does not articulate any specific challenge. Accordingly, I find no merit in this ground of appeal with any reasonable prospect of success to warrant the grant of leave to appeal.

[33] For these reason, on the application to extend time to appeal, the application fails. There is no good reason to depart from the general rule that costs follow the event. The Applicants must therefore pay the Respondent’s costs of the application to extend time

¹⁹ 21st Edition at page 565 margin heading 50.32

to appeal to be assessed by this Court in default of agreement on the application of either party after the expiry of 28 days of the date of this decision.

APPLICATION LEAVE TO APPEAL:

[34] For completeness, the application for leave to appeal being made out of time rendered it a nullity as per **Grant et al v Tanzil (Supra)** (Paragraph 18). The Court has not extended the time for Applicants to make the application for leave to appeal, the application filed on August 10, 2022 is accordingly dismissed with no order as to costs.

ORDER:

[35] It is hereby ordered that:

1. The Applicants' application filed on August 10, 2022 is dismissed with no order as to costs;
2. The Applicants' application filed on October 06, 2022 is dismissed; and
3. The Applicants' shall pay the Respondent's costs of the application filed on October 06, 2022 to be assessed by this Court in default of agreement on the application of either party after the expiry of 28 days from the delivery of this decision.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar