

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

ANGUILLA
VIDEOCONFERENCE
4th – 7th July 2022

APPLICATIONS AND APPEALS

Case Name:

Carl Palmer
v
[1] The Superintendent of Prisons
[2] The Attorney General

[AXAHCVAP2018/0013]
(Anguilla)

Date:

Monday, 4th July 2022

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Merlanih Lim appearing amicus curiae
Respondents: Mr. Sasha Courtney

Issues:

Civil appeal – Refusal of leave to apply for judicial review – Whether threshold for judicial review claim was satisfied by appellant – Test in *Sharma v Deputy Director of Public Prosecutions & Ors* [2006] UKPC 57 – Whether there was an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy – Whether learned judge erred by conducting a substantive hearing on the merits of the claim contrary to part 56 of the Civil Procedure Rules 2000 – Decision by Tribunal of Inquiry upholding two

charges of discreditable conduct against the appellant – Whether the Tribunal of Inquiry’s decision was irrational and unreasonable – Whether the learned judge erred by accepting that the superintendent of prisons correctly exercised his discretion by referring the listed charge up to the Governor – Whether the referral of the charge to the Governor was a rational decision – Whether learned judge erred in fact and law by denying appellant’s application for leave to appeal

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed in its entirety.
2. No order as to costs on the appeal.

Reason:

This was an appeal from the decision of the learned trial judge which was rendered on 30th July 2018 in which he refused the appellant permission to bring judicial review proceedings. The bases on which judicial review proceedings may be brought are well known and invariably, the matters will require that one shows either some form of illegality, irrationality, or what is called Wednesbury unreasonableness or procedural impropriety in seeking to review the decision making process made by a body or tribunal as the case may be.

The appellant at the hearing of the application for leave was unrepresented and he sought to have reviewed the decision of the superintendent of prisons for referring the listed charge up to the Governor. He also sought to challenge the Tribunal of Inquiry led by Ms. Eustella Fontaine (“the Fontaine Tribunal”) on the basis that, in effect, the Fontaine Tribunal had not conducted a proper review or a complete full inquiry into the complaints and that Ms. Fontaine had not therefore properly assessed the original Tribunal of Inquiry led by Don Mitchell CBE. QC (“the Mitchell Tribunal”) which inquired into the complaints made against the appellant and also whether Ms. Fontaine had given reasons for her report.

These were contained in grounds b, c, d and f of the grounds of appeal. The overarching ground brought by the appellant was ground a, in which the appellant complained to the Court that contrary to the spirit and precedent in the Eastern Caribbean Court of Appeal decision in *Next Level Engineering v the Attorney General et al ANUHC VAP2007/0017* (delivered 24th July 2007, unreported) that the learned judge in the matter proceeded to hear and decide the substantive action in the appellant's proposed claim.

The appellant also contended that the learned judge therefore went further than required by the cases and by the principles as set out in *Sharma v Deputy Director of Public Prosecutions & Ors* [2006] UKPC 57. The Court referred to the principles in *Sharma*, which was a decision of the Privy Council. At paragraph 14(4) of that judgment the Board stated:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R(N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468...:

“... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that

will in practice be required for an allegation to be proved on the balance of probabilities.”

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen”...”

The Court adopted this passage in relation to the appeal. The Court also reviewed the totality of the judge’s reasoning contained in his decision dated 30th July 2018. The Court noted that he was required to carry out an evaluation of the evidence in order to decide whether the test for leave had been made out. The Court found no basis for faulting the manner in which the learned judge dealt with the grounds which were being put forward by the appellant or in the conduct of the proceedings themselves, albeit that he gave to the appellant, who was unrepresented, considerable latitude in setting out the precise bases of the complaints which he was seeking to make and to examine them.

When the grounds of the appeal were taken in the context of the task which the learned trial judge was to undertake, the Court did not consider that any of the grounds had any merit whatsoever and they were accordingly dismissed. As it related to ground e, that ground was not specifically argued before the Court but in any event, the Court found no merit in that ground as well, having regard to the Fontaine Tribunal report. It was clear that the learned trial judge had well at the forefront of his mind the principles enunciated in the case of Sharma and the Court decided that he did not conduct a mini trial as asserted by the appellant. The appeal was therefore dismissed in its entirety.

Case Name:

James Boyer

v

**SOF 82 Anguilla Holdings, LLC
dba Four Seasons Resorts and Residences
Anguilla**

**[AXAHCVAP2021/0009]
(Anguilla)**

Date: Monday, 4th July 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Jean M. Dyer and Ms. Liska Hutchinson

Respondent: Ms. Tara Carter

Issues: Interlocutory appeal – Appeal against refusal of application for summary judgment – Whether the learned master erred in refusing the appellant’s application for summary judgment – Whether the Court ought to interfere with the exercise of the learned master’s discretion on the ground that it was blatantly wrong – Whether the learned master erred in finding that the Laws of Anguilla governed all provisions not specified in the appellant’s employment contract – Whether Part 7 of the Labour (Relations) Act, 2018 contradicted the termination clause in the appellant’s contract - Whether an employee under a fixed term contract can be made redundant if there is no express redundancy clause in the contract – Whether the appellant reached the threshold for summary judgment in the court below – Whether the issues raised in the claim ought to be ventilated at trial

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. Costs on the appeal are awarded to the respondent, agreed in the sum of US\$500.00, to be paid on or before the 31st of August 2022.

Reason:

The Court was of the view that this matter was not one which was amenable to the summary judgment procedure and therefore the learned master did not exceed the generous ambit of her discretion when she refused to grant summary judgment to the appellant.

The Court had regard to the principles set out in *Myett's Enterprises Limited v Kimberley Cooke Leigh* and another [2021] ECSCJ No. 558 (delivered 19th May 2021), which dealt with an appeal from the grant of an application for summary judgment in a labour relations matter. At paragraphs 12, 13 and 14, the court set out the principles governing summary judgment procedure as follows:

“The summary judgment procedure is designed to deal with cases which are not fit for trial. It was aptly described by Lord Briggs in the Privy Council decision in *Sagicor Bank Jamaica Limited v Taylor-Wright* [2018] UKPC 12 in the following way:

“Part 15 of the CPR provides...a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.”

13. As a general principle, summary judgment should not be granted unless it is apparent that the claimant or defendant has no real prospect

of succeeding on or defending the claim. This principle is embodied in rule 15.2 of the CPR. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR stated that the words ‘no real prospect of succeeding’ required no explanation as they spoke for themselves. The words do not connote a ‘surefire’ case or even a substantial prospect of success. Nor do they suggest that summary judgment will only be granted if the claim or defence will invariably fail. The word ‘real’ takes on its plain and ordinary meaning, being a realistic, as opposed to fanciful, prospect of success.

14. The proper approach of the court to these applications is well-established. In determining whether the claimant or defendant has a real prospect of success, the judge or master must critically examine the pleadings and such evidence which has been adduced by the parties. However, he or she must refrain from conducting a mini-trial and making factual findings on important issues.

In *Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste* [2010] ECSCJ No. 8 (delivered 11th January 2010) this Court explained the proper approach as follows:

“...Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in *Swain v Hillman* is that the claim or the defence has no “real” (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such

evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the Claimant or the Defendant could establish its case then it is open to the court to enter summary judgment.”

The court found that the interpretation of the appellant’s employment contract coupled with the Labour (Relations) Act, 2018 lent itself to rivaling interpretations. Consequently, the matter was not one which was fit for the summary judgment process, but would be more apt, as was said by the Privy Council in *Hallman Holding Ltd v Webster and another* [2016] UKPC 3, for the procedure of a trial of a preliminary issue. The court found that this case was one which lent itself to such an approach. Accordingly, the appeal was dismissed.

Case Name:

Vanroy Hodge

v

The Anguilla Air & Sea Ports Authority

**[AXAHCVAP2022/0001]
(Anguilla)**

Date:

Tuesday, 5th July 2022

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Applicant:

Ms. Paulette Harrigan

Respondent:

Ms. Jean M. Dyer and Ms. Liska Hutchinson

Issues: Application to strike out hearing bundle

Type of Order: Oral decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. Leave is granted to the respondent to withdraw the hearing bundle filed on 29th June 2022.
2. Concomitantly, leave is granted to the appellant to withdraw the application which sought to strike out the respondent's hearing bundle.

Reason: Counsel for the respondent withdrew the hearing bundle filed on 29th June 2022. Accordingly, the application to strike out the notice of appeal fell away.

Case Name: Vanroy Hodge

v

The Anguilla Air & Sea Ports Authority

[AXAHCVAP2022/0001]
(Anguilla)

Date: Tuesday, 5th July 2022

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Paulette Harrigan

Respondent: Ms. Jean M. Dyer and Ms. Liska Hutchinson

Issues: Interlocutory appeal - Default judgment - Setting aside default judgment - Exceptional circumstances - Rule 13.3(2) of the Civil Procedure Rules 2000 - Whether master erred in finding that there were exceptional circumstances warranting setting aside of default judgment - Whether master used the correct test in finding that there were exceptional circumstances - Limitation defence - Section 1(1) of the Public Authorities Protection Act, Revised Statutes of Anguilla, Cap. P115 ("PAPA") - Whether master erred in finding that the respondent could be afforded the protection of a limitation defence - Whether master failed to consider the evidence of the appellant in finding that the respondent was protected by the PAPA - Whether master exceeded the generous ambit of her discretion

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Paul Morrison

v

Percy Thomas

[AXAHC VAP2021/0008]
(Anguilla)

Date: Thursday, 7th July 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]

Appearances:
Appellant: Mrs. Tona Simpson Whyte

Respondent: Mr. Kerith Kentish

Issues: Interlocutory appeal – Default judgment – Assessment of damages after default judgment – Failure by appellant to file and serve witness statements in accordance with time stipulated in rule 16.2(2)(b) of the Civil Procedure Rules 2000 – Relief from sanctions – Extension of time – Whether master erred in treating the application as one for relief from sanctions when it was properly an application for an extension for time – No order by Court as to time for the service of witness statements – Whether in absence of a Court order stipulating a timeframe for the service of witness statements a sanction is attached to rule 16.2(2)(b) – Whether the sanction in rule 29.11 applies to rule 16.2(2)(b) in the circumstances – Whether the learned master erred and misdirected herself by proceeding to determine the application based on relief from sanctions principles – Whether learned master erred in denying the appellant’s application – Whether the learned master erred by failing to enter upon an assessment of damages

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed. The witness statement and submissions filed by the appellant/ claimant on 12th and 25th November respectively are deemed properly filed.
2. The master’s order below is set aside in its entirety.
3. The matter is remitted to the court below for the conduct of the assessment of damages.

4. The respondent shall file and serve his witness statements and written submissions in respect of the assessment on or before 29th July 2022.
5. The respondent shall have his costs on the extension application in the court below fixed in the sum of US \$750.00 payable by the appellant on or before 22nd July 2022.
6. The appellant shall have his costs on the appeal fixed in the sum of US \$500.00 payable by the respondent on or before 22nd July 2022.

Reason:

This was an appeal from the decision of the learned master dated 20th July 2021, in which she refused an application to extend time to file and serve witness statements pursuant to CPR 16.2(2), which deals with the procedure on an assessment of damages following the grant of a default judgment. The default judgment was entered by the court on 13th October 2020.

The Court noted that the application was framed as one for relief from sanctions pursuant to CPR 26.8. However, at the hearing before the master, the appellant urged that the application was truly one for an extension of time under the Court's case management powers contained in CPR 26.1(k). The respondent's contention was that CPR 16.2 incorporates the sanction contained in CPR 29.11 because of the bullet note under rule 16.2(2) which draws a party's attention to CPR rules 29.8 to 29.12. The appellant's contention was that CPR 16.2 does not attract the sanction contained under rule 29.11.

The Court adopted the observations expressed by Saunders JA, as he then was, in paragraph 21 of *The Treasure Island Company and another v Audubon Holdings Limited and others* [2004] ECSCJ No. 92, where he stated:

"CPR 29.11 has such severe consequences for a litigant in breach of it that I think that, in keeping with the overriding objective, a Court should liberally approach its second sub-rule."

The Court was of the view that where any sanction is imposed, that sanction must be expressed in the rule itself. The Court may not imply into a rule a sanction for non-compliance. This was made clear by the Privy Council in *Attorney General v Keron Matthews* [2011] UKPC 38 and by this Court in *Carleen Pemberton v Mark Brantley* [2011] ECSCJ No. 229. The Court was also of the view that the mere pointer of the bullet note under CPR 16.2(2) is simply not enough to import into that rule the consequence contained in rule 29.11. Such an approach would call for applying a modified meaning to rule 29.11 in order to make it applicable to rule 16.2, which is quite workable without having to resort to such a modification for imposing such a drastic consequence.

It is also the case that many rules which set down timetables in imperative language do not automatically attract a sanction when they are breached. However, the Civil Procedure Rules do provide, in rule 26.7, for a party to apply to the court for the imposition of a sanction for the breach of a rule, direction or an order of the court. Accordingly, the Court was of the view that the learned master erred in not treating the application as being properly one for an extension of time. In treating the application as one for relief from sanctions, a more stringent test would have been required to be applied, since the conditions there fetter the court's power and they must be satisfied conjunctively. On an application for an extension of time however, the court is empowered with a broad discretion to consider a number of factors which are not exhaustive, the usual ones being: the length of the delay, the nature of the delay, whether there was a good excuse for the delay, whether there was prejudice to any party, the chances of success, and generally the whole nature of the party's case.

This was a matter where a default judgment had been entered. The court had not been made aware of any application to set it aside or that any defence was put forward at any time and therefore the judgment was in full effect in terms of liability. The only question that remained was one of quantum. The court, in exercising its discretion, ought to look at all of these circumstances in determining whether to grant relief.

Where there has been a procedural error, the Court would have regard to CPR 26.9, where the Court is empowered, with or without an application, to put matters right. Having considered the material which was before the Court on the application, this Court was of the view that had the master applied the principles governing an application for an extension of time, she would have concluded, in the exercise of her discretion, that an extension of time in the circumstances of this case ought to have been granted and she ought to have exercised her powers under CPR 26.9 to put matters right and deem the witness statement filed on 12th November 2020 and the written submissions filed on 25th November 2020 properly filed.

Accordingly, this Court, in the exercise of its discretion, deemed the said witness statement and submissions filed on the 12th and 25th of November 2020 respectively, to be properly filed.

The Court noted that there was common ground in relation to the master's treatment of simply dismissing the assessment of damages without more. Notwithstanding her refusal to grant relief and allow the witness statement to stand, given the nature of the case, which was a claim in defamation actionable per se, without proof of actual damage, she ought to have proceeded on the assessment of damages and not simply dismissed it by reason of not allowing the witness statement to stand.

Case Name:

Jamila Aliena William

v

The Commissioner of Police

**[AXAMCRAP2015/0002]
(Anguilla)**

Date:

Thursday, 7th July 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant:	Ms. Dawn Cush
Respondent:	Ms. Erica Edwards

Issues: Magisterial criminal appeal – Appeal against conviction and sentence – No case submission – Whether the learned magistrate erred in dismissing no case submission – Whether learned magistrate at close of defence case erred when inviting appellant and virtual complainant to view inadmissible surveillance video evidence – Delay in delivery of judgment – Non-compliance with rules of court – Appellant’s failure to file and serve documents in accordance with rules of court

Type of Order: Directions

Result / Order: IT IS HEREBY ORDERED AND DIRECTED THAT:

1. The hearing of this appeal is adjourned to allow the appellant to put matters for the hearing in order by taking the requisite steps to comply with the Rules of Court.
2. The appellant shall take all the necessary steps to bring herself in compliance with the Rules of Court for the readiness of hearing of the appeal and shall serve all requisite documents on the respondent by no later than 3rd August 2022.
3. The respondent shall be at liberty to file evidence and or submissions in response by no later than 2nd September 2022.
4. The appellant shall give notice to the Court that the relevant steps have been taken, whereupon

the Chief Registrar shall list the appeal for hearing by the Court.

Reason:

The Court noted that this appeal was not yet ready to be heard given the state of filing of documents without compliance with the rules of court. The court also noted that the respondent had not been served with submissions filed purportedly on 8th February 2022. The hearing of this appeal was accordingly adjourned to allow the appellant to put matters for the hearing in order by taking the requisite steps to comply with the rules of Court.