IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 28 OF 2016

JOHN RUDON Appellant

v

SANTIAGO CASTILLO LIMITED Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Franz Parke	Justice of Appeal

S Duncan for the respondent.
H E Elrington SC, counsel for the appellant, absent.
Appellant absent.

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25 October and 19 December 2017.

SIR MANUEL SOSA P

Introduction

[1] This was a preliminary objection ('the objection') taken by Santiago Castillo Limited, the respondent ('Sancas') to the hearing of what, as it turns out, was the purported appeal of John Rudon from an order made by Abel J ('the judge') in the court below in Claim No 448 of 2013 on 10 June 2016, but not perfected until 4 July 2016. On 25 October 2017, in the unexplained absence of both Mr H E Elrington SC, counsel on

the record for Mr Rudon, and Mr Rudon himself, this Court upheld the objection, ruled that the purported notice of appeal was a nullity, struck out the purported appeal and ordered that Sancas should have its costs of the objection, to be taxed if not sooner agreed. In my opinion, the upholding of the objection, the ruling on the purported notice of appeal, the striking out of the appeal and the costs order were all correct for the reasons which I shall now give.

The decision to proceed in the absence of Mr Elrington and Mr Rudon

[2] Mr Elrington not having appeared when the purported appeal was called up on the afternoon of 25 October, the Court was informed by the Deputy Registrar (Appeals), Ms Alberta Pérez, that, apart from having, some days earlier, given him notice of the date on, and time at, which the purported appeal and objection would be called for hearing, she had sent both an email and a text message to him by way of reminders earlier on 25 October but had heard nothing from him in reply. In the light of similar previous experiences with Mr Elrington, the Court found this report entirely credible. The members of the panel also recalled amongst themselves that, a few days earlier, on 19 October 2017, another appeal called up at 10.04 am, viz *Jones v Stephenson*, had had to be stood down until 11 am for the reason that Mr Elrington was not in the courtroom and the Court was informed, to its astonishment, that he was in fact on his way to Orange Walk Town, Orange Walk District. On appearing before the Court at 11 am, Mr Elrington had explained that someone in his office had erroneously told him that he was not to be in this Court on that morning.

[3] Before deciding to proceed in the absence of Mr Elrington on 25 October, the Court enquired aloud more than once whether Mr Rudon was in the audience; but there was no indication that he was.

[4] It was in these circumstances that the decision was taken to proceed in the absence not only of Mr Elrington but also of Mr Rudon.

The objection

[5] The objection, in a nutshell, was that there was no appeal properly before the court for the reason that leave to appeal was required but had not been obtained prior to the filing of the purported notice of appeal. Counsel for Sancas advanced it in the guise of a Notice of Motion to Strike Out the Appeal filed on 7 August 2017. However, at a case management conference held on 29 August 2017, the case management panel indicated that the so-called application was, in its view, essentially a preliminary objection for the purposes of Order II, rule 7 of the Court of Appeal Rules ('the Rules') and would be treated as such and accordingly heard when the appeal was called for hearing.

The statutory provisions

[6] The relevant statutory provisions are contained in section 14 of the Court of Appeal Act ('the Act'). In her **Written Submissions in Support of the Notice of Motion to Strike Out the Appeal** on behalf of Sancas, Ms Duncan referred the Court to three different paragraphs of subsections (1) and (3) of that section. Those paragraphs were, in the case of subsection (1), the ones shown as (a) and (g) and, in the case of subsection (3), the one shown as (b). The Court did not, however, consider the second of these paragraphs, ie para (g), to be of relevance in the consideration of the objection. In my respectful view, clearly expressed at the hearing, the pertinent provisions of section 14 are those to be found at subsections (1)(h) and (3)(b). Those provisions cannot, however, be set out in isolation in this judgment, for their meaning becomes clear only when they are viewed in their immediate statutory context. It is therefore essential to here set out subsections (1) and (3), virtually in their entirety. They respectively read as follows:

> '14.-(1) An appeal shall lie to the Court in any cause or matter from any order of the Supreme Court or a judge thereof where such order is –
>
> (a) final and is not such an order as is referred to in paragraph (f) or (g);
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> (b) an order made upon the finding or verdict of a jury;
>
> (c) an order upon the application for a new trial;

(d) a decree nisi in a matrimonial cause or an order in an Admiralty action determining liability;

(e) an order declared by rules of court to be of the nature of a final order;

(f) an order upon appeal from any other court, tribunal, body or person;

(g) (i) a final order of a judge of the Supreme Court made in chambers;

(ii) an order made with the consent of the parties;

(iii) an order as to costs;

(h) an order not referred to elsewhere in this subsection.'

'(3) No appeal shall lie from any order referred to in ... paragraph (h) of subsection (1):-

(a) except

(i) where the liberty of the subject or the custody of infants is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise;

(iv) in the case of an order on a special case stated under the Arbitration Act;

(v) in the case of an order refusing unconditional leave to defend an action;

(b) in any other case, except with the leave of the Supreme Court, or, if it refuses, of the Court.'

The facts

[7] Exhibited to an affidavit of Ms Duncan as to formal matters was a copy of the relevant order of the judge ('the order'), which, as material for present purposes and speaking for itself, reads as follows:

'The 20th June, 17th July 2014 and 10th June 2016

...

UPON THE Notice of Application dated 11th February 2014 coming on for hearing;

...

IT IS HEREBY ORDERED THAT

1. The Claimant's statement of case is struck out as an abuse of process under Part 26.3(1)(c) and in the inherent jurisdiction of the Court.
2. The Claimant is ordered to pay costs to the Defendant in the sum of $2,500.00.

Dated the 4th day of July 2016.'

At para 7 of her affidavit, Ms Duncan described the order in the terms following:

> '[The order] is a decision of [the judge] to strike out the claim upon a Notice of Application to Strike Out the claim filed on behalf of [Sancas]. It is an interlocutory order or a final order of a judge of the Supreme Court made in Chambers and [Mr Rudon] required leave to appeal before it (*sic*) could have properly filed his appeal.'

She stated elsewhere in her affidavit that the service of a notice of appeal was effected at the office where she is employed on 25 July 2017 and that neither the court below nor this Court has granted Mr Rudon leave to appeal in this matter.

[8] No affidavit, whether in reply or otherwise, was filed on behalf of Mr Rudon.

The submissions on the objection

[9] As already adumbrated above, counsel for Sancas submitted that the order falls into the category of order identified in para (g)(i) of section 14(1) of the Act, viz 'a final order of a judge of the Supreme Court made in Chambers'. Referring to the case of *Coventry Capital Inc v Antigua Overseas Bank Ltd (in receivership)*, Civil Appeal No 4 of 2013 (judgment delivered on 27 March 2015), she said that this Court, in a judgment written by Blackman JA, had there accepted an argument of counsel for the applicant which had in effect been that 'an interlocutory order is a final order of a judge of the Supreme Court made in Chambers'. As I understood counsel, her contention was that the

order was a final order but, given that, on the uncontroverted evidence, it was made in Chambers, it had somehow been converted into an interlocutory order. I cannot otherwise make sense of her espousing of the proposition that an interlocutory order is a final order of a judge made in chambers. Ms Duncan also placed reliance on cases decided outside this jurisdiction, viz *Owens Bank Ltd v Gerard Cauche and ors*, Privy Council Appeal No 30 of 1987, *Nevis Island Administration v La Coppropretе Du Navire J31 and ors*, Civil Appeal No 7 of 2009 (judgment delivered on 29 December 2005) and *McDonna v Richardson*, Civil Appeal No 3 of 2005 (judgment delivered on 29 June 2007). The baffling point about the final order of a judge made in chambers notwithstanding, the written submissions of Sancas end on the clear note that, applying the application test approved in all the cases cited, the order was an interlocutory order, which could not be appealed from without a prior grant of leave by the court below or this Court.

[10] Mr Elrington filed **Submissions on Behalf of Appellant** which he wrongly sought to use as a substitute for an affidavit by purporting to exhibit four documents to them. I consider that such documents are not properly before the Court and have, accordingly, disregarded them.

[11] Treating, for ease of reference, the paragraphs of these submissions as numbered, I note the twofold contention in paras 4 and 5 that the order was final, rather than interlocutory, in nature and that there was, accordingly, no need to obtain leave to appeal before filing the purported notice of appeal. The paragraphs that follow are concerned with showing that the judge erred in striking out the claim; but in the last of them, ie para 13, it is submitted that '[t]here is no evidence or law brought by Appellant (*sic*) in the Strike Out Application.'

Discussion

[12] Reverting briefly, by way of preface, to the point already made at para [6], above, the Court did not regard as relevant for present purposes para (g)(i) of section 14(1) of the Act. For my part, I am at a loss to understand how an argument founded on the proposition that an order is interlocutory in nature can in the same breath treat it as, in the language of para (g)(i), 'a final order of a judge of the Supreme Court made in Chambers'. An order which is interlocutory cannot at the same time be final. Moreover,

notwithstanding Ms Duncan's assertion to the contrary, there is nothing in the judgment in *Coventry Capital* to suggest that this Court there accepted a contention by counsel for the respondent to the effect that 'an interlocutory order is a final order of a judge of the Supreme Court made in Chambers'.

[13] A convenient point of departure, given that preface, is the question whether the order was interlocutory as Ms Duncan, notwithstanding the contradictory nature of the just-noted proposition to which she subscribes, undeniably submits. It is, in my view, settled law that the question whether an order is final or interlocutory in nature is to be determined by means of the application test. Thus in *Sylvester v Singh*, Civil Appeal No 10 of 1992, (judgment delivered on 18 September 1995), a case decided in the Court of Appeal of St Vincent and the Grenadines long before the two above-cited cases relied upon by Ms Duncan, Byron JA, as he then was, having discussed the English authorities, said, in the antepenultimate paragraph of his judgment:

> 'In conclusion the English Courts are now committed to the application test in determining whether an order or judgment is interlocutory. Applying that test, the order under appeal is interlocutory.'

As to the nature of that test, he had already said, at the 11th para (unnumbered) of his judgment:

> 'Under the application test, an order would be final if it was Made (*sic*) on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order made by [the judge at first instance] would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued.'

[14] In the instant case, by the same token, if the judge had determined the application made by Sancas in favour of Mr Rudon, the claim would not have been struck out but, rather, would have continued. Accordingly, the order was interlocutory in nature.

[15] That being the case, the next question is whether leave to appeal was required as Ms Duncan further contends. That question immediately leads one to the categories of order set out at section 14(1). The adjective 'interlocutory', as opposed to the adjective 'final', is conspicuous in its absence from paras (a) to (g), which together identify, in that subsection, a total of nine different categories of order. An interlocutory order, then, can properly be said to be an order not referred to in section 14(1) paras (a) to (g). In other words, it falls into the category of order described in para (h) of that subsection by virtue of being 'an order not referred to elsewhere in this subsection'.

[16] The question under consideration is not, however, thus answered. To arrive at an answer one must go on to look at subsection (3) of section 14, for it is not every order falling into the category identified in para (h) which is subject to the requirement for leave to appeal. There may be an appeal as of right from an order falling into any of the five sub-categories found listed as items (i) to (v) in para (a), for which see para [6] of the present judgment. The order in the instant case does not, it is plain, belong in any of those five sub-categories. It can only belong in the category of residuary orders identified in para (b) of subsection (3), ie 'any other case'. Therefore, one can only appeal from it, to adopt the words of the paragraph, 'with the leave of the Supreme Court or, if it refuses, of the Court'.

[17] The submission of Mr Elrington that the order is final in nature takes no, or insufficient, account of the provisions of section 14 discussed above and was accordingly rejected. His further sweeping and vague contention that Ms Duncan failed to adduce supporting evidence and to identify a legal basis for the objection is similarly lacking. The evidence and law to which she directed this Court has been pinpointed above. There is nothing whatever in Mr Elrington's contention. True it is that Ms Duncan erroneously invoked para (g) rather than para (h) of section 14(1); but, in my opinion, this Court was fully entitled to take the provisions of the latter paragraph into account in arriving at its decision. For another case of a preliminary objection in which the Court (Henry P and Malone and Liverpool JJA) proceeded in similar fashion, see *Valladarez v Williams*, Civil Appeal No 4 of 1989, Reasons for Decision delivered on 17 May 1990.

[18] As to Mr Elrington's complaint that the judge erred in striking out the claim, nothing more need be said than that it was entirely misguided. On a preliminary objection, the Court is not concerned with the merits of the decision of the judge below.

[19] That the proper course for the Court in a case where a would-be appellant files a purported notice of appeal without having first obtaining leave to appeal as required by the Rules is to strike out such purported notice as a nullity was laid down as far back as 1983 in *Henderson v Archila* (1983) 37 WIR 90, in which Sir John Summerfield P, writing for this Court, memorably said:

> '[O]ur law is clear and positive and no appeal proceeding can be commenced until leave has been granted. Any notice which may have been filed without leave being first obtained is of no effect and is completely valueless and void. It cannot be revived by the subsequent granting of leave. Accordingly, the purported notice of appeal was struck out with costs.'

This dictum has stood the test of time, a fact attested to by two of the later decisions cited by Ms Duncan in her written submissions. In the first, *Sylvester's* case, it was cited with approval in the 8th para (unnumbered) of the judgment (written, as already noted above, by Byron JA) and in the second, *McDonna's* case, it was similarly cited in para [28] of the judgment (written by Barrow JA). I would further note that, in another local case in which a preliminary objection was upheld, viz *Shu Shae Lee and ors v Jabbour Affif*, Civil Appeal No 23 of 2002 (oral ruling delivered on 20 October 2003), a strong panel, for which Mottley JA delivered the ruling, followed the decision in *Henderson*, upon which Mr Denys A Barrow SC, counsel for Mr Affif, had heavily relied.

[20] Those are the reasons which impelled me to move, on 25 October 2017, the upholding of the objection and the disposal of this matter in the manner set out at para **[1]**, above.

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SIR MANUEL SOSA P

DUCILLE JA

[21] I have perused the draft judgment of the learned President and am entirely in agreement.

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DUCILLE JA

PARKE JA

[22] I agree with the reasons for judgment of the learned President which I have read in draft.

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PARKE JA