APRIL 2018

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UPDATE

Leave Not Required to Cross-Appeal

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The Full Court of the Eastern Caribbean Court of Appeal has recently resolved a conflict between two decisions of single judges of the Court, and confirmed that a respondent who wishes to pursue a cross-appeal is not required to obtain leave to appeal if the cross-appeal relates to a different issue or a different part of the judgment for which leave to appeal has already been granted. The Court also took the opportunity to confirm that the concept of implied sanctions has no place in the Eastern Caribbean Civil Procedure Rules, and disapproved English Court of Appeal authority which requires that the relief from sanctions regime be applied to applications for an extension of time for appealing in a case of any complexity.

Introduction

In *KMG International NV v DP Holding SA*[1], the Full Court of the Eastern Caribbean Court of Appeal reviewed a decision of a single judge of the Court by which he had struck out a cross-appeal filed by DP Holding SA (**DPH**), a Swiss company, as being '*a nullity having been filed without leave when leave was required for its filing*.'

Background

On 10 May 2017, the British Virgin Islands Commercial Court delivered a judgment which dealt with two issues:

It allowed DPH's application seeking the setting aside of permission to serve the originating application of the Appellant (**KMG**) for the appointment of liquidators to DPH out of the jurisdiction on *forum non conveniens* grounds (the **Forum Issue**); and

It refused DPH's application seeking to set aside the appointment of provisional liquidators over DPH pending the determination of the originating application (the **Provisional Liquidation Issue**).

It was common ground that the judgment was an interlocutory judgment, and as such, it was necessary to obtain leave to appeal under section 30 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap. 80) (the **Supreme Court Act**) to appeal from it.

KMG applied for and was granted leave, on 6 June 2017, to appeal the judgment. By its notice of appeal filed on 8 June 2017, and deemed served on DPH on 13 June 2017, KMG appealed on the Forum Issue.

[1] Interlocutory Appeal No. BVIHCMAP2017/0013, 18 April 2018.

On 28 June 2017, DPH filed and served on KMG a counter-notice of appeal. By the counter-notice DPH:

(a) sought to uphold the ruling on the Forum Issue for the reasons given by the court below and for additional reasons; and

(b) to the extent that KMG's appeal on the Forum Issue succeeded, cross-appealed on the Provisional Liquidation Issue.

In September 2017, KMG applied to strike out that part of the counter-notice by which DPH cross-appealed on the Provisional Liquidation Issue, it being of the view that DPH required leave to appeal on the Provisional Liquidation Issue. On 2 November 2017, a single judge of the Court of Appeal ordered that the counter-notice be struck out.

DPH applied to have the single judge's decision reviewed by the Full Court. It also made an application, in the alternative, for an extension of time for leave to cross-appeal on the Provisional Liquidation Issue.

The Jurisdiction to Review

The source of the Full Court's jurisdiction to review any order made by a single judge is rule 27 of the Court of Appeal Rules and rule 62.16A(1) of the Civil Procedure Rules (the CPR).

As a preliminary point, KMG sought to argue that the Full Court's jurisdiction was not engaged because these rules provide that the Court can only review orders made in pending appeals. It argued that the order of the single judge did not relate to an appeal which was extant, as the cross-appeal could not be said to be a pending appeal. However, the Full Court accepted that the single judge's order was made within the pending appeal commenced by KMG, DPH's counter-notice having been filed in those appeal proceedings.

Whether Leave to Cross-Appeal was Required

KMG argued that, even though the CPR would not work practicably given the timelines contained in CPR 62.82 for the filing of a counter-notice on service of a notice of appeal, the CPR cannot derogate from the statutory requirement for leave in section 30 of the Supreme Court Act.

KMG also accepted that there would have been no need for DPH to appeal or cross-appeal on the Provisional Liquidation Issue unless KMG had appealed the Forum Issue, as the order appointing the provisional liquidators would naturally fall away if the conclusion of the court below on the Forum Issue remained undisturbed. It nevertheless argued that, insofar as the counter-notice also contained by way of cross-appeal a challenge to the decision of the court below on the Provisional Liquidation Issue, it was, in effect, 'an appeal' and therefore DPH required leave to cross-appeal.

DPH contended that no leave to cross-appeal was required, KMG having obtained leave to appeal the judgment and having commenced an appeal pursuant to the leave granted.

The Earlier Conflicting Decisions

In support of their respective positions, both sides relied upon decisions of single judges of the Court of Appeal. KMG relied upon the judgment of Mitchell JA in *Malitskiy & Filipenko v Oledo Petroleum Ltd*[3]. DPH relied upon the decision of *Barrow JA in Frett v Wheatley Consulting & Ors*[4].

The appellants in *Malitskiy* had filed an interlocutory appeal with leave against the refusal of the BVI Commercial Court to make final a provisional sanction earlier granted and the dismissal of their derivative claim on the basis that they had also filed an unfair prejudice claim. By their cross-appeal, the respondents put forward reasons why the order of the court below should be upheld and additionally challenged the award of costs made in their favour as being inadequate. At paragraph 10 of the judgment, the learned judge, seemingly of his own motion, and without inviting submissions on the point opined:

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[2] CPR 62.8(3) requires that a counter-notice be filed within 14 days of service of the notice of appeal.

[3] Appeal No. BVIHCMAP2013/0006, 16 August 2013.

[4] Civil Appeal No. 2 of 2006, 1 June 2006.

> *However, this cross-appeal has been filed without leave of the court as required by section 30 of the [Supreme Court Act] and is not properly before me.*

In *Frett*, however, the point was fully argued. In that case Mr Frett had appealed as of right in respect of a finding of liability and a consequential award of damages and costs against him. The claimants filed a counter-notice in which they challenged the order directing that they pay the costs of another defendant (Mr Schultheis) in respect of the claim brought by them against Mr Schultheis, but which claim had been dismissed against him. In their counter-notice, the claimants contended that Mr Frett (and not the claimants) ought to have also been ordered to pay Mr Schultheis' costs. Mr Schultheis applied to strike out the counter-notice, one of the bases being that the claimants needed leave to appeal an order as to costs only and, no leave having been sought, that the counter-notice was a nullity.

At paragraph 14 of his judgment, Barrow JA said:

> *In the case of a counter notice there is already before the court of appeal the other issue or issues raised by the notice of appeal. Therefore, a counter notice as to costs only is not equivalent to an appeal as to costs only. ... In this particular appeal, before there was the counter notice, there was first Mr Frett's appeal against liability and damages. It seems to me right on principle that if the appellant needs no leave to appeal against an order as to costs, when costs are but one aspect of the order that is being appealed, then a counter appellant similarly needs no leave since costs are but one aspect of the order that is being appealed. ... Once costs are not the sole issue no leave is required. I see no reason why it should matter, in the case of a counter notice, that it is the counter appellant and not the appellant who has placed the other issues before the court of appeal.*

The Full Court's Decision

In resolving the conflicting decisions, the Full Court held as follows:

> *To our mind, the approach adopted by Barrow JA is the correct approach and we adopt his reasoning that it should not matter in the case of a counter notice that it is the counter appellant and not the appellant who has placed the other issues before the Court of Appeal. Once an appeal has been commenced whether as of right or with permission, it does not matter that it is the counter appellant, and not the appellant who has placed another issue or other issues which was the subject of the judgment or decision on appeal before the Court of Appeal. The leave granted to KMG to appeal the judgment, and KMG having launched an appeal pursuant to that leave, enables a counter appellant to cross appeal on an issue which was the subject of that judgment without necessitating the counter appellant seeking separate permission.*

The Full Court continued:

> *In our view, section 30 of the Supreme Court Act contemplates the requirements for leave where a party is commencing an appeal. Once an appeal against a judgment is commenced with leave, then the jurisdiction of the Court of Appeal to deal with any issue arising under the judgment becomes engaged, and the party desiring to cross-appeal on an issue considered in the same judgment may do so by counter notice without requiring separate leave. This avoids a multiplicity of proceedings and promotes judicial economy of time and expense. CPR 62.8 is premised on this approach. This does not involve the Rules being in conflict with Section 30 of the Supreme Court Act once the true scope of the provision in the Act is understood and applied in its proper context.*

The Full Court accordingly reinstated DPH's cross-appeal.

Applications for Extension of Time to Appeal

Although there was no need for the Full Court to deal with DPH's alternative application for an extension of time for leave to appeal having determined that no separate leave was required, it considered it useful to make an observation in respect of the question: whether an application for extension of time to comply with a rule, order or direction where no sanction is expressed nonetheless attracts the application of the

provisions of CPR 26.8 dealing with relief against sanctions, or in any event attracts the approach to the grant of extensions as laid down by the English Court of Appeal in *Sayers v Clarke Walker*[5].

In *Sayers* the English Court of Appeal considered that applications for an extension of time to appeal out of time were analogous to applications for relief from sanctions; unless time was extended there was an implied sanction, namely that the applicant could not appeal. Therefore, it held that in cases of any complexity, the court had to take into account along with the overriding objective the matters set out in the English equivalent of CPR 26.8. The *Sayers* approach had been adopted by the Full Court in its decision in *C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd*[6], and was subsequently followed in a decision of a single judge of the Court.

However, in *KMG International*, the Full Court expressed the view that:

(a) there was no sound basis for applying a more stringent regime analogous to relief from sanctions in respect of a complex case, but not for one considered simple; and

(b) The decision of the Judicial Committee of the Privy Council in *Attorney-General of Trinidad and Tobago v Matthews*[7] had rejected once and for all the notion of an implied sanction as espoused in *Sayers*.

The Full Court therefore observed that the CPR makes no room for implying sanctions.

Conclusion

This decision of the Full Court in *KMG International* is important for two reasons. First, it confirms that a respondent to an appeal who wishes to cross-appeal is not required to obtain leave to appeal if the cross-appeal relates to a different issue or a different part of the judgment for which leave to appeal has already been granted. Secondly, the Court has confirmed that no sanctions can be implied where the CPR do not expressly provide a sanction, and accordingly, an applicant for an extension of time within which to appeal will not need to have resort to the relief for sanctions regime in a case of any complexity. This represents a significant departure from the current English practice.

Mourant act on behalf of DPH in these proceedings and instructed Stephen Moverley Smith QC of XXIV Old Buildings.

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[5] [2002] 1 WLR 3095.

[6] Appeal No. HCVAP 2011/017, 19 March 2012.

[7] [2011] UKPC 38