The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2019

B E T W E E N:

TONY MARTIN

Appellant

- v -

LARRY ENGRESSEI

Respondent

Before: **Clarke, President**
Bell, JA
Smellie, JA

Appearances: Sara-Ann Tucker, Trott & Duncan Ltd., for the Appellant; Christopher Swan, Christopher E. Swan & Co., for the Respondent

Date of Hearing: **8th November 2019**
Date of Reasons: **19th November 2019**

REASONS FOR JUDGMENT

Civil appeal from Magistrates' Court – application out of time – criteria to be satisfied for leave to be granted

BELL JA:

Introduction

1. This appeal is from a judgment of Rihiiluoma AJ dated 5 April 2019, given in appellate proceedings from the Magistrates' Court. Those proceedings were taken by way of appeal from a decision of the Wor. Maxanne Anderson dated 13 September 2017, in which she had refused an application made by the

Appellant for leave to appeal out of time in respect of the judgment which she had given on 9 June 2016. That judgment was given following a hearing which had been attended by the Respondent and his counsel Mr. Swan, but not by the Appellant or any counsel on his behalf. In the Appellant's absence the magistrate had heard evidence from the Respondent (the plaintiff in those proceedings), found that the Respondent had proved his case, and awarded him $23,925.00 and costs.

2. The Appellant, through his attorneys Trott & Duncan, filed a notice of motion for leave to appeal the Magistrates' Court judgment out of time, on 31 January 2017, more than seven months after the trial. Part of that seven month delay occurred because, Ms. Tucker had, in the first instance, sought to set aside the judgment, rather than to appeal it. In his ruling at paragraph 9, Rihiiluoma AJ said:

> *"…it is now common ground that an Application to Set Aside Judgment was not the proper procedure to attack/reverse the Judgment. The proper procedure as outlined above is for the Appellant to file a Notice of Intention to Appeal within 30 days of receipt of the judgment and a Notice of Appeal within 14 days of receipt of the Record of Appeal."*

We agree with this comment on the appropriate procedure.

3. The application for leave to appeal out of time was purportedly made pursuant to rule 2 of the Civil Appeal Rules 1971, which rules generally govern appeals from the Magistrates' Court to the Supreme Court. However, rule 2 governs applications for leave to appeal when leave is required because the relevant judgment is interlocutory as opposed to final. The rule is not concerned with the grant of extensions of time where a filing deadline has been missed. The application was supported by an affidavit sworn by the Appellant on 9 February 2017, in which he explained that he had not been aware of the trial date, but completely failed to explain the delay between 22 June 2016 or

thereabouts, when he did become aware that the trial had taken place, and a judgment had been given against him, and 31 January 2017, when the application to appeal out of time was made. The proceedings in Magistrates' Court had been initiated by the Respondent as plaintiff on 11 September 2014 (so now more than five years ago), and the Appellant was the defendant and counterclaimant to those proceedings. The first return date was 24 October 2014, at which time counsel for the Appellant appeared, and the matter was disputed. There were then several mention dates before the trial date of 9 June 2016 was set. The Appellant in his affidavit sworn in support of the application for leave to appeal out of time, dated 9 February 2017, stated that he had not been aware of either the 19 February 2016 date (at which counsel from Trott & Duncan had appeared on his behalf) or, more critically, the scheduled trial date of 9 June 2016.

4. By the time of the trial date itself, it appears that the particular attorney having conduct of the matter on the Appellant's behalf had left the firm of Trott & Duncan, and the Appellant in his affidavit says that he first became aware that judgment had been given against him when he received a phone call from Mr. Swan's office. Unfortunately, the Appellant does not indicate when this phone call took place, and while the position was confused somewhat by a misdated letter, it is common ground that by the end of June, the Appellant's attorneys were aware of the existence of the judgment. The Appellant's affidavit of 9 February 2017 concluded with a statement by the Appellant that he had been "*vigorously attempting to have this matter rectified*" since he maintained a denial of liability. Such vigorous attempts had not been made by the proper procedural route.

5. In the event, the application for leave to appeal was heard before Wor. Anderson on 13 September 2017, at which time she refused the Appellant's application for leave to appeal out of time. The reasons given were (1) that the Appellant had not provided any good and substantial reason for the substantial

delay for filing any appeal documentation, and (2) that even if the Appellant had met this first criterion, the Appellant had not set out grounds which *prima facie* showed a good cause as to why the appeal should be heard.

The Judgment in the Supreme Court

6. In his ruling, Rihiiluoma AJ dealt with the merits of the appeal under the heading "ANALYSIS AND CONCLUSION". He indicated that the Appellant had not filed any affidavit setting out good and substantial reasons as to why an appeal had not been filed within the prescribed time period, commenting that the Appellant had not filed an affidavit setting out any reasons as to why the appeal was not filed within the prescribed time period, much less good and substantial reasons. He described the Appellant's affidavit which had dealt with the non-appearance of counsel at trial as having explained how judgment was obtained in the Appellant's absence, but without beginning to touch on the reasons for the delay in filing an appeal. He also commented that Ms. Tucker herself had filed two affidavits, neither of which explained the delay. The learned judge then carried on to say that there was no affidavit speaking to a *prima facie* good cause why the appeal should be heard (of which more later in this judgment), and proceeded to dismiss the appeal.

7. The learned judge then mentioned the four reasons given for the delay, being, (1) failure to attend trial, (2) loss of client file, (3) adoption of wrong procedure, and (4) difficulty in obtaining a transcript of the trial. But he did so only for the purpose of saying that he would not have regarded these reasons as representing good and substantial reasons, even if they had been put in an affidavit. In regard to the last reason, the judge pointed out that if the Appellant had filed a notice of intention to appeal, that would have caused the Magistrates' Court to produce a Record of Appeal, which would have included a transcript of the trial.

The Procedure Governing Civil Appeals from the Magistrates' Court

8. It became clear during the course of argument that there was some confusion as to the governing provisions by which an application for leave to appeal a decision of the Magistrates' Court should be made. Section 7 of the Civil Appeals Act of 1971 governs extensions of time, but it does so with reference to a notice of appeal, as opposed to a notice of intention to appeal, the document which starts the appellate process, per section 4 of the Act. That first step puts in hand the preparation of the record, and the filing of the notice of appeal takes place only after delivery of the record to the appellant. The Civil Appeals Rules 1971 ("the Rules") provide for the form of notice of intention to appeal in the briefest possible form, and the Rules say nothing about an extension of time, whether in relation to a notice of intention to appeal or a notice of appeal. Hence the application of the Rules of the Court of Appeal for Bermuda, which apply per Rule 14 of the Rules in respect of matters not expressly provided for in the Rules.

9. The relevant Court of Appeal rule is contained in Order 2, rule 4(2), and is of course not drawn with reference to the procedure pertaining in Magistrates' Court, but governs applications for an enlargement of time within which to appeal generally. Ms. Tucker clearly understood she was pursuing such an application before Wor. Anderson, and accordingly the Court of Appeal Rules govern the procedure. They provide that every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which *prima facie* show good cause why the appeal should be heard.

10. I pause to say that during the course of argument, Ms. Tucker accepted that no affidavit complying with the Court of Appeal Rules had in fact been filed. Neither had any grounds of appeal been filed when the application to extend

time came to be argued before Wor. Anderson on 13 September 2017. The Notice of Appeal from the Magistrates' Court was filed on 8 November 2017. Ms. Tucker also accepted that a failure to pursue the correct procedure could not be advanced as justification for delay.

11. Those two matters were sufficient for the learned judge to dismiss the appeal, although it should be noted that in paragraph 16 of his ruling, the learned judge refers to there having been no affidavit speaking to a *prima facie* good cause why the appeal should be heard; there is no requirement that this second aspect of matters should be supported by affidavit. But the point is academic, given that there were no grounds put before the magistrate when the leave application was argued.

The Grounds of Appeal

12. Regrettably, there is little useful purpose served in going through the grounds of appeal in any detail. They do not address the fundamental procedural failings as to the manner in which the Appellant's counsel has advanced this appeal. The first ground addresses the reason for the Appellant's failure to appear at the trial of June 2016. The second refers to a reference in the ruling to a file having been lost, and the third refers to the request which had been made for the CourtSmart recording of the trial. None of these is relevant to the failure to explain the delay on affidavit in the manner prescribed by the relevant rules. The fourth ground sets out some eleven grounds of complaint in relation to the conduct of the underlying trial. These different grounds are said to support a contention that the learned judge had erred in fact and misdirected himself at paragraph 16 of his ruling in that "*prima facie* good cause why the appeal should be heard" was contained in the notice of appeal. But since the notice of appeal was not filed until after the application for an extension of time had been argued, those complaints go nowhere. They were not contained in the appellant's affidavit of 9 February 2017, and were not

before the magistrate in any other form. They simply do not address the position as it was when the application for an extension of time was argued before Wor. Anderson.

13. The fifth ground of appeal refers to paragraph 18 of the ruling, but misunderstands what the learned judge was saying in that paragraph, which was that even if the matters set out had been put on affidavit, he would not have regarded them as constituting "good and substantial reasons" for the failure to appeal within the requisite time. The ground refers again to their being grounds of appeal *prima facie* showing good cause why the appeal should have been heard, without addressing the fact that such grounds were not before the magistrate when the application for an extension of time was argued. The last ground simply refers to the overriding objective contained in the Rules of the Supreme Court 1985. Those rules have no application to these proceedings and during the course of argument, Ms. Tucker accepted as much.

Additional Argument

14. I should make reference to one final matter covered in argument, which covered argument before the Senior Magistrate on 25 January 2017. It is hard to follow the timing here, and more particularly what was the application that was before the Senior Magistrate. Ms. Tucker was at this point pressing for the CourtSmart record of the Magistrates' Court trial, but had not filed any papers seeking an extension of time within which to appeal. Be that as it may, Ms. Tucker appeared before the Senior Magistrate on 25 January 2017, when he ordered that the Appellant should file and serve a "Notice of Intention to Appeal and Leave to file Appeal out of Time and do so within 14 days", and set a date for the hearing of such application and an application for a stay.

15. Ms Tucker suggested that following this appearance both counsel had been proceeding on the wrong basis, since the effect of the Senior Magistrate's order

was that he had granted both leave to file and serve a notice of intention to appeal and leave to appeal out of time.

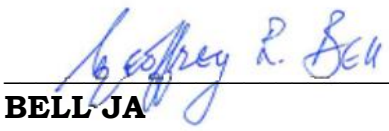
16. There are two problems with this argument. The first is the one identified by the learned judge in paragraph 11 of his ruling. By reason of the fact that the Senior Magistrate had set a date for the leave to appeal out of time application, it is safe to assume that his order that the Appellant should file and serve a notice of intention to appeal and leave to file an appeal out of time was not intended to constitute the grant of leave to appeal out of time. But the second is that Ms. Tucker herself proceeded on that basis thereafter. There is no doubt but that before Wor. Anderson on 13 September 2017, Ms. Tucker was making an application to appeal out of time, as the record demonstrates. There is nothing to this point.

The Law

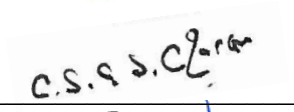
17. Both counsel relied upon the authority of this court of *Holder v Holder* [2015] a decision which was given by this Court on16 June 2015. The only purpose in mentioning this authority is that it is worth repeating the comments made by Baker P in that case, when he concluded his judgment by pointing out that one of the purposes of there being a limited period of time for launching an appeal was the desirability of finality in litigation, so that the parties to it can know where they stand. In this case, it is now more than five years since the Magistrates' Court proceedings were initiated, and almost three and half years since the trial in Magistrates' Court. It took almost another two years for the matter to come before Rihiiluoma AJ.

Conclusion

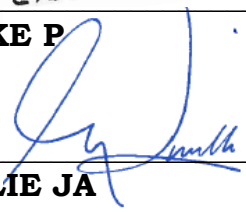
18. For the reasons set out above, we dismissed the appeal on 8 November 2019, and awarded costs to the Respondent. These are our reasons for having done so.



BELL JA



CLARKE P



SMELLIE JA