(13)

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1989

BETWEEN;

MELVIN ARTHUR ~~HALL~~ JOELL - Appellant

and

EDMUND G. MADURO
H. LAVITY STOUT - Respondents

Before: The Honourable Mr. Justice Bishop - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron (Acting)

Appearances: J. Hall and Dancia Penn for the Appellant
The Attorney General for the Respondents

1990: Jan. 15,
June 25.

JUDGMENT

MOE, J.A.:

This is an application seeking leave of the Court to enter an appeal outside of the time limited by the Rules of Court for appealing against a Judgment of the High Court. The Judgment against which the appellant seeks leave to appeal was delivered on the 13th July 1989, refusing the applicant leave to issue writs of certiorari, mandamus and prohibition against the respondents. The time limit for appealing against that Judgment expired on the 24th August 1989.

The solicitor for the applicant deposited in the Court Registry on the 28th August 1989 a Notice of Appeal dated 24th August 1989. On 18th December 1989 at the hearing of an application for an enlargement of the time within which the record in the proposed appeal may be filed, it was pointed out that the deposit of the Notice of Appeal on the 28th August 1989, was not within the time prescribed for entering an appeal against a judgment. On the 22nd December 1989 the Notice of Motion seeking the enlargement of the time within which to enter the appeal was filed. The Affidavit filed in support of the Application set out four reasons for not entering the appeal within the time limited by the rules for so doing. They were

/(i) difficulties...

1) Difficulties experienced in discussing the matter with and getting advice from Counsel.

2) The existence of other court proceedings complicated the applicant's ability to decide whether or not to appeal.

3) There was some delay in transfer of funds to the Applicant from another country and he was unable to properly instruct his solicitor by the time originally stipulated by her.

4) There was an honest and mistaken belief on the part of the Applicant and his solicitor that the time limited for the filing of the appeal expired on the 31st August 1989.

Counsel for the Applicant while conceding that reasons 1 to 3 were not cogent reasons contended strongly for the acceptance of reason 4 as good and substantial reason for the grant of the application. He cited Vidale v. Mayor, Alderman and Citizens of Port of Spain 13 W.I.R. 299 and De Normont v. Agostini Estates 19 W.I.R. 329 with particular reference to the judgment of Fraser J.A. in each case. However in answer to the Acting Chief Justice he accepted the characterisation of the submissions as seeking the indulgence of the Court for what was the failure of Counsel to comply with the Court of Appeal rules.

The Attorney General submitted that none of the reasons advanced ought to justify the grant of the application.

He conceded that the only apparent substantial reason was reason 4 but he referred to Casimir v. Shillingford 10 W.I.R. 269 in which this Court did not grant an application for extension of the time within which to enter an appeal as a matter of indulgence. He also pointed to the applicant's need to put before the Court grounds of appeal showing prima facie good cause to appeal which in this case he contended the applicant has not done.

Mr. Hall in reply dealt mainly with the question whether he had shown good cause for the appeal. He contended that the applicant had a good case to be granted leave to proceed for the orders of certiorari, mandamus and prohibition which he sought before the learned Judge.

ORDER 64 Rule 6 makes provision for extension of the time prescribed for appealing. Paragraph 2 thereof provides:-

/2) Every...

> "(2) Every application for extension of time when made to a Judge of the Court shall be made by summons and when made to the Court shall be made by motion. Every summons or motion filed shall be supported by an affidavit setting forth substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor."

The applicant must satisfy two requirements. Firstly, the affidavit in support must set out substantial reasons for the application or a good excuse for the applicant's lateness. Secondly, the affidavit must set out grounds of appeal which show good cause for the appeal.

I turn to the first requirement. In view of the concession of Counsel the question to be answered is whether the mistake of the applicant and/or his solicitor amounts to a substantial reason for the appeal and if so should the Court exercise its discretion in his favour.

In Vidale v Port of Spain (Mayor, Alderman and Citizens) 13 W.I.R. 297 at page 304, Fraser J.A. had this to say with regard to a mistake of a Solicitor:-

> "In Gatti v. Shoosmith (1939) 3 All E.R. 916, owing to a misreading of a rule, the applicant was a few days too late in entering an appeal. The intention to appeal had been notified to the respondent's solicitor by letter sent within the time specified in the rule. The applicant asked that the time might be extended on the ground that the failure to enter the appeal within the time limited was due to the mistake of a legal adviser. In extending the time the Court of Appeal in England held there is nothing in the nature of a mistake of a legal adviser to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend on the facts of each case. Sir Wilfred Greene MR said (1939) 3 All E.R. at page 919:
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> > 'What I venture to think is the proper rule which this Court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.'
>
> In my judgment, a mistake of a solicitor may be a good reason for making an application for leave to appeal out of time and the Court in considering the facts will have to determine whether in a particular case

/the delay.....

> the delay was due substantially to the mistake and if so, whether, having regard to all the circumstances of the case, the Court in the exercise of its discretion ought to make it an exception to the rule; but it is not to be thought that the discretion will necessarily be exercised in every set of facts. The reason may be good but it must also be substantial. Bearing in mind that it is entirely in the discretion of the Court to grant or refuse an extension of time the reason given must be examined in the light of the other circumstances. The length of time that has elapsed is always a material factor so that although a mistake of a solicitor may be a contributing factor, the delay in bringing an appeal may not necessarily be attributable thereto; the delay may have continued a long time after the mistake was discovered....."

That case was followed in De Noirmont v. F.A. Agostini Estates Ltd., 19 W.I.R. 328, Aminali and Others v. Zamurath Ramnarine 34 W.I.R.358 and Martin V. Chow 34 W.I.R. 379.

In Martins Tours Ltd. v.Senta Gilmore 14 W.I.R. 136 the Court of Appeal of Jamaica, on an application for leave to appeal against a decision in respect of which Notice of Appeal had not been filed in time due to the mistake of the legal representative as to the time within which Notice of Appeal should be filed, took the view that on the facts of that case the Court would ordinarily follow Gatti v. Shoosmith (supra) and grant leave to appeal.

A different view appears to have been taken by the Court of Appeal of Guyana in Moses v Kumar 14 W.I.R. 328, where in accordance with the Rules which goverened the application for extension of the time within which an appeal may be brought, the application was required to disclose exceptional circumstances before relief could be granted to an applicant, and it was held that the mistake of Counsel would not be an exceptional circumstance in that case.

This Court in Casimir v. Shillingford and Pinard 10 W.I.R. 269 on an application for extension of time within which to appeal on the ground that pressure of work on the solicitor was the reason for the delay, held that:-

> (1) Pressure of work on the part of a solicitor was not a good and substantial reason within the meaning of Order 11 & 3(5) of the Federal Supreme Court (Appeals) Rules, 1959 (West Indies) to justify granting an enlargement of time under that

/Rule.....

Rule. Order 11, r.3(5) is in terms similar to Order 64, r. 6(2);

(2) the Court was unable to accede to the request to grant the application as a matter of indulgence, for to do so would be tantamount to doing away with the rule and would open the way to a flood of applications by solicitors who might not be diligent in the conduct of their clients' affairs.

I do not regard Casimir v. Shillingford's case (supra) as a decision on whether mistakes on the part of a legal practitioner is a good reason for an application for extension of time within which to appeal. In that case since the reason put up for failing to appeal within the prescribed time was not a good reason, the application had to fail for the Court could not grant it as a matter of indulgence.

There is therefore abundant authority for the proposition that a mistake by a solicitor may be a good ground for making application for leave to appeal out of time. But where there is application on that ground the Court must look at the facts of the particular case and exercise its discretion in the light of those facts. The position was stated in this way by Bernard J.A. in Martin v. Chow 34 W.I.R. at 386,"Each case must be looked at on its own particular facts and the discretion must be exercised in relation to those particular facts, bearing inmind that at all times the burden will be on the applicant to show that the delay was due substantially to the offending act of the legal practitioner".

In the instant case, the mistake of solicitor and the applicant put forward is the mistaken belief that the time limit for entering the appeal expired on the 31 August 1989. The relevant rule is Order 64, r.5.

Rule 5 reads:-

"5(1) Subject to the provisions of this rule and of rule 6, no appeal shall be brought after the expiration of six weeks from the date of Judgment delivered or order made, against which the appeal is brought, provided that in the case of appeals -

(a) against an interlocatory order or judgment the period shall be fourteen days, and where leave to appeal against such order or judgment required fourteen days from the grant of leave;

/(b) against an...

(b) against an order or judgment made in the matter of the winding up of a company, or in the matter of any bankruptcy, the period shall be twenty-one days.

An appeal shall be deemed to have been brought when the notice of appeal has been filed."

There has been no satisfactory explanation as to how a reading or interpretation of that Rule prompted the mistake that the time limit for appealing from a judgment delivered on 13th July 1989 expired on 31st August 1989 and not 24th August 1989. There was some suggestion that the error arose from the misapprehension that the time limit commenced from the date of entry of the judgment which date however was 18th July 1989. Calculating on that basis the time limit would have expired on the 29th August 1989. Something is amiss about the explanation given. It becomes harder to accept the explanation given as the substantive cause for the failure to comply with the rules when one bears in mind the applicant's statement that he was unable to properly instruct his solicitor by the time originally stipulated by her.

I would hold that in the particular circumstances of thhis case the applicant has not satisfactorily shown that the failure to comply with the rules was due to the mistaken belief of the solicitor or himself.

On this ground I think that the application ought to be refused with costs.

G.C.R. MOE,
Justice of Appeal

E.H.A. BISHOP,
Chief Justice (Acting)

C.M.D. BYRON,
Justice of Appeal (Acting)