SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.8 OF 2003

BETWEEN:

SAMUEL FELICIEN

Appellant

and

STANISLAUS MODESTE

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal

Appearances:

Mr. Peter I. Foster for the Appellant
Ms. Mary Juliana Charles for the Respondent

2004: October 22;
October 29.

JUDGMENT

[1] ALLEYNE, J.A.: On March 20th, 2003, the Appellant's legal practitioner at the time, Mrs. Fleur Byron-Cox, filed a Notice of Appeal against the judgment of Justice Adrian Saunders as he then was, in High Court suit number 788 of 1989, in which the Appellant was plaintiff and the Respondent was Defendant. The learned trial Judge had given judgment for the Defendant/Respondent with costs. The case concerned a dispute over title to a not insignificant portion of land. The appeal is based largely on grounds relating to findings of fact.

[2] The Civil Procedure Rules 2000 Part 62.9 provides that upon notice of appeal being filed, where the appeal is from the High Court, as in this case, the court office must forthwith:

[i] arrange for the court below to prepare a transcript of the notes of evidence

[ii] when (these) are prepared give notice to all parties that copies of the transcript are available.

[3]

[4] Part 62.12(2) provides that within 21 days of receipt of the said notice, all parties must inform the Appellant of the documents that they wish to have included in the record, and Part 62.12(3) requires that within 42 days of the receipt of the said notice the Appellant must prepare and file with the court office six sets of the record comprising, among other things, of a transcript or other record of the evidence given in the court below.

[5] In April 2003 the High Court informed the parties that certain notes were missing. (I will address this in more detail later.) Counsel for the parties were requested to submit their notes of evidence, which they did. On April 16th, 2003, the court office sent to the Appellant's solicitor a bundle purporting to be notes of evidence. The solicitor refused to accept the papers, indicating that she no longer represented the Appellant and had sent all relevant papers to Mr. Peter Foster, the Appellant's new solicitor.

[6] On 26th January 2004, the court office gave written notice, in purported compliance with Part 62.9 of CPR, of the availability of the notes of evidence. However, on 3rd February 2004 the Appellant's new solicitor wrote to the Registrar of the High Court, copied to the Respondent's solicitor, refusing to accept the notes. There matters rested until September 2004 when the Court of Appeal gave the parties notice of a hearing to determine why the appeal should not be dismissed for want of prosecution.

[7] At the trial of the action the only record of the proceedings made by the court comprised the notes made by the learned trial Judge, which were recorded contemporaneously on his lap top computer. When the appeal was filed and it became necessary to reproduce the notes of evidence for the production of the

record, it was discovered that the learned Judge's notes relating to the second and third days of this three-day trial could not be recovered from his computer. In the absence of any other court record of the proceedings, efforts were made to reconstruct the notes of evidence from the combined notes taken at the trial by Counsel for the parties. However, the Appellant and his Counsel do not accept the notes so produced, on the ground that they do not fully, accurately and reliably reflect the evidence at the trial and do not form an acceptable record for the purposes of the appeal. The appeal, as earlier indicated, is based largely on grounds related to the learned trial Judge's findings of fact.

[8] Learned Counsel for the Respondent submitted that the Appellant has failed to comply with the provisions of Part 62.12(3) which, as earlier stated, requires the Appellant to prepare and file the record within 42 days of the receipt of notice that copies of the transcript of the notes of evidence are available. Learned Counsel contended that the said notice had been given to the Appellant on 26th January 2004, and that to date the record has not been filed. Counsel cited in support of his contention the cases of William Edgecombe & Another v Peter Freund[1] and Harold Simon v Carol Henry & Another[2]. I do not find either of these judgments helpful in relation to the matter before me.

[9] The question before me does not concern the length of or reason for delay, but whether there has been a delay at all on the part of the Appellant. This issue hangs on the question whether or not the transcript of the notes of evidence is indeed available; whether, in fact, the Appellant can be required to pursue and argue his appeal on the basis of a record of the proceedings and in particular of the evidence produced from the notes of Counsel appearing for the parties at the trial, in the absence of the agreement and consent of both parties.

[1] Civil appeal No. 9 of 2001 St. Lucia.
[2] Civil appeal No. 1 of 1995 Antigua and Barbuda.

[10] The Civil Procedure Rules 2000 offer no assistance in relation to the question what is the transcript of the notes of evidence. The West Indies Associated States Court of Appeal Rules 1968[3] (now defunct in relation to civil appeals, having been replaced by CPR 2000) at Rule 21 refers to notes of proceedings taken by any person employed by any court, or taken by the Judge of the court below, which are required to be supplied by the Registrar for the purpose of preparation of the record of appeal. Rule 21(3) provides as follows:

> "On hearing of an appeal the Court shall have power, if the notes of the Judge of the court below or a transcript of the evidence are not produced, or if there are no such notes or transcript, to hear and determine such appeal upon any other evidence or statement of what occurred before such Judge as the Court may deem sufficient."

[11] This rule mirrors Order 55 Rule 7(4) of the Rules of the Supreme Court (UK), which, however, adds a provision that:

> "Except where the court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments."

So the court, under that regime, has a discretion to admit for the purposes of the record material other than what may be termed the 'official transcript', but this discretion is exercised with caution. In Blackstone's Civil Practice 2000[4] reference is made to Practice Direction for the Court of Appeal (Civil Division) 7.5 which provides that all transcripts must be official copies provided by the shorthand writers or transcribers, and, in Direction 7.5.2 "unless the court otherwise directs, notes of judgment or evidence will not be accepted. Normally the court will only accept notes in place of transcripts where the case requires such an urgent hearing that there is not time to obtain them."

[12] It does not seem to me that this is an appropriate case in which any discretion that the court might have to allow Counsel's notes to be treated, for the purposes of the appeal, as the transcript of the evidence in the trial, should be exercised. The

[3] S.R.&O. 1968 No. 10.
[4] Page 1944.

Appellant could justifiably feel aggrieved that a reconstruction of the notes of evidence based at any rate in part on the records of Counsel for the Respondent, and with which Counsel who appeared for the Appellant in the court below is dissatisfied, should be used as the official record for the purposes of his appeal against the learned trial Judge's findings of fact, and adverse judgment in the case, with which he is dissatisfied. I find support for this view in Blackstone's Civil Practice 2002[5], where the learned author, in reference to the court's judgment, says "These points are important, because appeals …. can only succeed by attacking the decision-making process in some way, and injustice may result if no reliable record is available of what was said in the lower court."

[13] I am not to be understood to be ruling that in no circumstances can a record of the evidence, other than the "official record", be used in an appeal. To so hold could inhibit the realisation of the overriding objective of the CPR 2000 to deal justly with cases, which includes saving expense, ensuring that cases are dealt with expeditiously, and allotting to each case an appropriate share of the court's resources while taking into account the need to allot resources to other cases. However, I am of the view that in this case the imperative to ensure that the parties are on an equal footing and that injustice does not result, and is seen not to result, can only be achieved by ensuring that a reliable record of what was said in the court below, particularly in relation to the evidence, including the cross-examination, on the second and third days of the trial, is available.

[14] By section 30(1) of the West Indies Associated States Supreme Court (Saint Lucia) Act[6], on the hearing of an appeal in any civil cause or matter the Court of Appeal has power to set aside the order appealed against and order that a new trial be held. It appears to me that this is the only course open to the court in its quest to achieve the overriding objective to do justice between the parties, and I

[5] Paragraph 71.20, page 823.
[6] Act No. 17 of 1969.

direct that this appeal be listed for hearing by the court to consider this course of action.

Brian Alleyne, SC
Justice of Appeal