COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2005

BETWEEN

FERDINAND FRAMPTON

Petitioner

and

[1] IAN PINARD
[2] THE RETURNING OFFICER FOR THE SOUFRIERE CONSTITUENCY
[3] THE CHIEF ELECTIONS OFFICER

Respondents

AND

BETWEEN:

CLAUDIUS SANFORD

Petitioner

and

[1] KELLY GRANEAU
[2] THE RETURNING OFFICER FOR THE SALYBIA CONSTITUENCY
[3] THE CHIEF ELECTIONS OFFICER

Respondents

AND

BETWEEN:

CURVIN FERREIRA

Petitioner

and

[1] VINCE HENDERSON
[2] THE RETURNING OFFICER FOR THE ST.JOSEPH CONSTITUENCY
[3] THE CHIEF ELECTIONS OFFICER

Respondents

AND

BETWEEN:

LEONARD NEWTON

Petitioner

and

[1] LOREEN BANNIS-ROBERTS
[2] THE RETURNING OFFICER FOR THE CASTLE BRUCE CONSTITUENCY
[3] THE CHIEF ELECTIONS OFFICER

Respondents

AND

BETWEEN:

JULIEN PREVOST

Petitioner

and

[1] RAYBURN BLACKMOORE
[2] THE RETURNING OFFICER FOR THE MAHAUT CONSTITUENCY
[3] THE CHIEF ELECTIONS OFFICER

Respondents

Before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

On written submissions
Duncan G. Stowe & Co. for the Applicants
Heather Felix - Evans for the 1st Respondents
Mr. Alick Lawrence for the 2nd and 3rd Respondents

2006: April 3.

JUDGMENT

[1] BARROW, J.A.: By a judgment of the High Court dated October 28th, 2005 Rawlins JA (completing a matter that he had started as a High Court judge) ordered that parts of the several election petitions in issue be struck out on the

grounds that they were vague and did not provide sufficient material particulars. On 16th November 2005 the petitioners applied for leave to appeal. They also applied for an extension of time within to appeal. But curiously, the thrust of their representation is that they are not out of time because time did not start running against them from the date of the judgment.

[2] It is not in dispute that the intended appeal is against an interlocutory order and an appeal may only be brought if leave to appeal is first obtained. If no leave is obtained a purported appeal is a nullity.[1] The time within which an application for leave to appeal must be brought is stated in the Civil Procedure Rules 2000 (CPR) in rule 62.2 (1) as follows:

> "(1) If an appeal may be made only with leave of the court below or the court, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought."

[3] A companion provision under CPR is rule 42.8 which provides:

> "A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date."

[4] In the English Court of Appeal in Sayers v Clarke Walker (A firm)[2] Brooke LJ confirmed that CPR had changed the former practice under which time for appealing ran from the date when the court's decision was drawn up, sealed or otherwise perfected and that, now, time starts running from the date of the judgment.

[5] In the notice of application for an extension of time and the affidavit in support that the lawyer for the applicants swore it is asserted that the judgment was never delivered to the lawyer. What fathers that contention is the manner in which the judgment was communicated to the lawyers. The applicants' affidavit reveals that Rawlins JA advised the Registrar of the High Court in Dominica by electronic

---

[1] White & Bruton [1984] 1 QB 570, Othneil Sylvester v Satrohan Singh St. Vincent & The Grenadines Civil Appeal No. 10 of 1992, Maria Hughes v The Attorney General of Antigua & Barbuda Civil Appeal No. 33 of 2003 (13th April 2004)

[2] [2002] EWCA Civ 645

message that he was sending the judgment to her for delivery and instructed her to call the solicitors for the parties to chambers that afternoon. He asked: "Please deliver a copy to them for reading, and when they have read, read the Order in the last paragraph for formality." The judge also took the precaution of sending electronically to the lawyers a copy of the message he had sent to the Registrar. Both messages were sent on 28th October.

[6] In his affidavit the lawyer acknowledges that he received the message. He does not say that he received it late; significantly, he does not say when he received it. Given the obvious importance that is attached to time in this application to extend time it is expected that he would have said he received the message from the judge late if that had been the case.

[7] The applicants' lawyer deposes that neither he nor his office received any contact or communication at any time from the Registrar as requested by the judge. He contends that the Registrar has still not complied with the instructions of Rawlins JA. Presumably he is referring to the instructions to call the lawyer to chambers and deliver a copy of the judgment to him for reading.

[8] The respondents did not file their affidavit in response by the time they were directed to do so and the applicants object to their application for an extension of time within which to file it. The respondents submit that the court should extend the time for filing their affidavit because their affidavit tells the true story of the delivery of the judgment. There is no proper application by the respondents for an extension of time to file their affidavit and I uphold the applicants' objection to extending time and refuse to permit reliance on that affidavit to show what the Registrar did. Therefore, the only evidence before this court is that contained in the affidavit by the applicants' lawyer that states that on 1st November 2005 the Deputy Registrar served his office with a copy of the judgment.

[9] The lawyer for the applicants relies on Brandon v Farrington[3] to support the argument that the judgment was not delivered. In that case a judge wrote his judgment, dated it and lodged it with the clerk of courts to await the outcome of a pending appeal. It was subsequently read in court by another judge, the writer having been a temporary judge and having ceased to act by the time the judgment was read. The issue arose whether the judge had delivered his decision before he retired. The Court of Appeal of Jamaica held that the judge who wrote the judgment had not delivered his judgment (but that the judgment was not invalidated by reason of not having been so delivered). The passage on which the applicants rely reads:

> "We are of the view that the lodgement of the judgment with the clerk of the courts was not a "delivery of the judgment" within the meaning of section 157. There was no public pronouncement, no formal entry of judgment in the records of the court and the parties were not informed."[4]

[10] What was in issue in that case was whether the lodging of a judgment with the clerk of courts, to hold in escrow until further instructions were given, amounted to delivery. That decision is of no relevance to this case where the very object of sending the judgment to the Registrar was for her to deliver the judgment by handing copies to the parties and reading out the result.

[11] The point that the applicants' lawyer makes is that he was not given notice by the Registrar that the judgment was going to be delivered that day and he was not given personally, by her, a copy of the judgment. While this is true, the applicants do not dispute that the Registrar issued the judgment as the judgment of the court. The judge himself had sent notification by electronic mail to the lawyer that the judgment would be delivered that day. Conclusively, in my view, the lawyer admitted that a copy of the judgment was served at his office on 1st November. He also seems to admit that counsel on the other side had served a copy of the judgment on him or his chambers on 31st October.

---

[3] (1980) 36 WIR 284
[4] At p. 288 d to e

[12] It is no longer the practice that a judgment can only be delivered by being pronounced in open court. CPR 2000 states in Part 42.2:

> "A party who is-
> (a) notified of the terms of the judgment or order by telephone, FAX or otherwise; or
> (b) …
> is bound by the terms of a judgment or order whether or not the judgment or order is served."

[13] In this case the court served the judgment on 1st November, so even if the applicants through their lawyer only knew of the terms of the judgment on that date the time for applying for leave to appeal started running then. By the time the applicants filed their application for leave to appeal the time for doing so had expired and their application for leave to appeal was a nullity unless they applied for and obtained an extension of time within which to file their application for leave.

[14] In the circumstances of this case and in view of its public importance it is appropriate, at this juncture, to state the fundamental premise that there are rules that govern the grant of an extension of time. The court cannot grant an extension of time purely as a matter of discretion. The court can only do so in accordance with the rules that are laid down. Not even in a case of the utmost public importance can the court overlook the rules because, in a particular case, the court thinks it fair or reasonable or appropriate or just to do so. The rules must be seen as establishing criteria that are definitive as to what is fair and reasonable and appropriate and just. Because these criteria were in existence before there arose the dispute to which they are to be applied, any possibility of subjective and uncertain considerations operating to influence a decision is excluded. The due application of the rules, therefore, is itself of the utmost public importance because those rules and their due application are the basis upon which opposing parties to litigation are entitled to and must expect their dispute to be determined.

[15] In a number of recent decisions this court has favoured the approach, in considering applications for the grant of an extension of time for appealing, of

relying on the criteria found in rule 26.8. As I stated in Nevis Island Administration v La Corpropriete Du Navire J31 et al[5]:

> "The argument in favour of relying on the criteria laid down in rule 26.8 recognizes that there is no express sanction prescribed for failing to apply for leave to appeal in time, in the way, for example, that failure to file a witness statement is visited with the sanction that the witness shall not be called.[6] However, although not expressed as such, the consequence that an intending appellant who fails to apply in time for leave to appeal when leave is required may not thereafter apply for leave to appeal is nonetheless a sanction. It is because the application for relief against that consequence or sanction is in essence no different in nature from the standard application for relief from an express sanction that it is appropriate, in my judgment, that the criteria prescribed in rule 26.8 should be applied.
>
> "An undoubted advantage that is to be gained from relying on the criteria for granting relief from sanction that CPR 2000 prescribes is certainty. There is no longer need to rely on judge made criteria with the uncertainties that attend varying judicial viewpoints as to what those criteria should be and what emphasis should be given to which of them. For example, in the … case [of Quillen v Harney Westwood and Reigels No.1][7] Singh JA stated that the appearance of "some chance of success"[8] of the proposed appeal trumped both inordinate delay (six months) and the clear absence of good reason for delay.[9] It was emphasized that the discretion to extend time was unfettered.[10] In contrast, certain of the criteria that are set out in rule 26.8 are made conditions precedent to the grant of relief and the court is expressly precluded from granting relief if certain of them are not satisfied. Therefore, the discretion to grant relief under the rules is distinctly fettered and, it may be noted, this is in sharp contrast to the open discretion that is found in the comparable English rule 3.9 (1).

[16] Rule 26.8 states:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (a) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
>
> (b) the failure to comply was not intentional;

---

[5] Saint Christopher and Nevis Civil Appeal No. 7 of 2005
[6] Rule 29.11
[7] [1999] ECLR 23
[8] At p. 26 A
[9] At p. 25 C and E to G
[10] See p. 25 A and 26 C

(c) there is a good explanation for the failure; and
(d) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(e) the effect which the granting of relief or not would have on each party;
(f) the interests of the administration of justice;
(g) whether the failure to comply has been or can be remedied within a reasonable time;
(h) whether the failure to comply was due to the party or the party's legal practitioner; and
(i) whether the trial date or any likely trial date can still be met if relief is granted."

[17] There are mandatory conditions imposed by this rule. It is stated in sub-rule (1) that the application must be made promptly and it must be supported by an affidavit. The application, in this case, satisfies both of these requirements. In sub-rule (2) a strict fetter is imposed upon the court's discretion – the court may grant relief only if it is satisfied that the failure to comply was not intentional, that there is a good explanation for the failure and the party in default has generally been compliant. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfies the court that the failure to comply was not intentional, there is a good explanation for the failure and the applicant has been generally compliant.

[18] In the instant case the affidavit for the applicants to which their lawyer deposed comprises sixteen paragraphs. In the first three paragraphs the deponent deals with prefatory matters, including the identity of the deponent, his personal knowledge of the matters to which he deposes and his conduct of the matters in the High Court in relation to which the applicants now seek to appeal. Paragraphs 4 to 10 speak to the delivery of the judgment and tell of the lawyer's receipt of an e-mail from the judge, that the lawyer did not receive any communication from the Registrar, that he received an e-mail from an opposing lawyer, that his office was served with a copy of the judgment on 1st November, and that to date the registrar

has failed to comply with the order of the judge. Paragraphs 11 to 13 tell of efforts by the deponent to contact the foreign lawyers who were also acting for the applicants. Paragraph 14 contends that to date the judgment has still not been delivered in accordance with the directions of the judge. Paragraph 15 contains 7 sub-paragraphs that summarize the grounds of the proposed appeal, and paragraph 16 states that the lawyer seeks leave to file a notice of appeal (sic) out of time.

[19] The applicants did not address even one of the three conditions that must be satisfied. The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied. (It is not as if though the applicants imperfectly complied by complying with the pre-CPR requirements for applying for an extension of time stated in the Quillen case.[11]) The failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position. The court is not permitted to guess and to supply the omissions in the application. In a matter as important as an election petition the duty of the applicants to act with care and expedition was all the greater, because of the public interest in the matter. It is not permissible for the applicants to violate clear rules and escape sanctions by leaving it to the court, impressed with the importance of the matter, to find a way out for the applicants. The importance of an election petition is a two way street. The interest of the petitioners in advancing their case is balanced by the interest of the respondents in opposing the petition. It is a dispute that must be resolved by the court according to established and settled rules. The rules are not draconian; where a party has made a slip the rules provide a procedure and criteria for avoiding the consequence. It cannot be too much to ask that the party in default satisfy the reasonable conditions that the rules lay down for obtaining relief.

[11] Quillen v Harney Westwood Reigels (No.1) [1999] ECLR 23

[20] Furthermore, the court decided recently in Eugene Hamilton v Cedric Liburd et al[12] that no appeal lays from an interlocutory as opposed to a final decision of the High court in an election petition. In those consolidated appeals the judge had struck out portions of the election petition and the respondents to the petition, who had procured the striking out, appealed against the refusal of the judge to strike out the entire petition. The petitioners sought to cross-appeal against the decision to strike out. The court upheld the objection that there could be no appeal, by either side, from the strike out decision based on section 36 of the Constitution of the Federation of St. Christopher and Nevis, which states in subsections (6) and (7):

> (6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining any such question as is referred to in subsection (1).
>
> (7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) and no appeal shall lie from any decision of the High Court in proceedings under this section *other than a final decision determining any such question as is referred to in subsection (1) of this section.*

[21] Section 40 (7) of the Constitution of the Commonwealth of Dominica is in identical terms to section 36 (7). It seems to me that the result would inescapably be the same in relation to the intended appeal in the present case and this would be a conclusive reason to refuse the application to extend time to allow the applicants to apply for leave to appeal. The court cannot grant leave to appeal where there is no right of appeal and so has no jurisdiction to entertain an appeal. However, because the point was not raised in these proceedings and counsel did not have an opportunity to be heard on it, I will rest my decision on the utter failure of the applicants to do what they needed to do to enable the court to exercise its discretion. Accordingly, I dismiss the application with costs to the respondents to be assessed by the registrar if not agreed.

Denys Barrow, SC
Justice of Appeal

---

[12] St. Christopher and Nevis Civil Appeals No. 11 of 2005, judgment delivered on 3rd April 2006