SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.32 OF 2005

IN THE MATTER of an application for (1) leave to amend the Notice of Appeal and for (2) an extension of time to file the Record of Appeal

AND IN THE MATTER of Part 62.4(7) and 62.16(1)(c) of the Eastern Caribbean Supreme Court Procedure Rules 2000 and under the Court of Appeal Rules No. 10 of 1968

BETWEEN:

RICHARD FREDERICK

Appellant/Applicant

and

[1] OWEN JOSEPH
[2] FERGUSON JOSEPH
[3] JONATHAN JOSEPH
[4] MAGDALENE JOSEPH

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Alvin St. Clair for the Appellant/Applicant
Mr. Dexter Theodore for the Respondents

2006: June 13;
October 16.

JUDGMENT

[1] RAWLINS, J.A.: The appellant, Mr. Frederick, applied for leave to amend the Notice of Appeal and for an extension of time to file and serve the record of Appeal. I dismissed the application on 13th June 2006 and ordered Mr. Frederick

to pay $500.00 costs to the Respondents. It recently came to my attention that an application was made to discharge or vary the order. This judgment gives the reasons for decision in order to facilitate the review of the order of 13th June 2006 by the Full Court. The reasons will be given against a brief background.

Background

[2] Shanks J. (Ag.) awarded damages for assault and trespass to the 1st, 3rd, and 4th respondents, who were the claimants in the High Court proceedings. His judgment was delivered on 22nd July 2005. The appellant filed an appeal against that decision on 19th August 2005. On 17th March 2006 the appellant applied for an order to set aside the judgment. This application was made on the ground that the claim in the High Court proceedings was prescribed and was incapable of being revived, because it was not served within the 3 year period limited by statute for the service of tortuous claims.[1] The appellant deposed in his affidavit in support of the application that the claim alleged that the assault and trespass occurred on 8th February 1998. He stated that although the claim was filed on 5th February 2001 it was not served on him until 9th February 2001, some 29 days after the 3 year limitation period. Accordingly, he stated, the claim was automatically extinguished after the limitation period and the judgment which was given for the 3 respondents cannot stand.

[3] It would have been quite obvious that the application to set aside the judgment of the High Court was a wholly incorrect procedure, in any event, but particularly in the face of an existing notice of appeal. A single judge of this Court therefore dismissed the application on 28th March 2006.

[4] On 5th April 2006 the appellant filed an application in which he prayed for 2 orders. The first prayer was for an order to amend the notice of appeal to include the 3 year prescription under article 2085 of the Civil Code as a new ground of appeal.

[1] By article 2085 of the Civil Procedure Code of St. Lucia, Cap. 242 of the Revised Laws of St. Lucia, 1957.

The second prayer was for an order to extend the time within which to file and serve the Record of Appeal. A judge of this Court dismissed the application for want of prosecution with $500.00 costs to be paid to the respondents.

[5] The appellant filed another application on 19th May 2006. In that application, he again sought an order to set aside the judgment on the ground of the 3 year prescription of the claim. The affidavit was in identical terms to the affidavit that supported the application of 5th April 2006. However, apparently realizing that this was the same incorrect procedure which was dismissed on 28th March 2006, he applied on 9th June 2006 for the same orders for which he prayed in the application of 5th April 2006 which was struck out for want of prosecution. The June 2006 application stated that an affidavit in support accompanied it, but there was no affidavit other than that which was filed in support of the application of 19th May 2006. At the hearing I permitted Mr. St. Clair, learned Counsel for the appellant, to withdraw the May 2006 application. However, I allowed him to rely on the affidavit that supported it for the purpose of the June 2006 application.

Reasons for decision

[6] I dismissed the application because, in my view, it was abusive of the process of the court on a compendium of grounds.

[7] The first ground was that an application must state, in addition to the order that an applicant seeks, the grounds on which the order is sought.[2] The present application does not contain any grounds. It simply states that the grounds are contained in the affidavit in support. However, the affidavit contains the evidence that supports the application. It does not contain any ground on which the order is sought.

[2] See rule 11.7(1) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the Rules").

[8] In the second place, the present application is in identical terms to the application of 5th April 2006. It was my view that since the April application was dismissed for want of prosecution, instead of filing another identical application, the appellant should have applied to restore the April application. This application should have been accompanied by a statement, by way of affidavit, of the reasons why he had not prosecuted the April 2006 application when it came for hearing on 16th May 2006. In the absence of an application to restore, it was my view that the present application was not properly before the court.

[9] In the third place, there was, in my view, an inordinate delay in bringing the application, without a convincing explanation for the delay.

[10] The tenor of the rules that govern appeals requires procedural steps to be taken in a timely manner for the prosecution of appeals. When the application for the order for leave to amend the Notice of Appeal by adding the prescription ground was first made in April 2006, some 8 months had elapsed since the Notice of Appeal was filed. That application was dismissed because the appellant did not prosecute it and the present application was filed some 10 months after the Notice of Appeal was filed.

[11] In relation to the application for an order to extend the time within which to file the Record, rule 62.9(b) of the Rules requires the Registrar of the High Court to arrange for the preparation of the transcript of a trial. It also requires the Registrar to notify the parties when the transcript is ready. Rule 62.12(2) of the Rules required the appellant to prepare and file 6 sets of the Record within 42 days of time when he received notification under rule 62.9(b) of the Rules. The Registrar notified the appellant on 26th January 2006 that the transcripts were ready and would have been delivered to him upon the payment of the required fee.[3] Had the appellant paid the fee and received the transcript promptly, the Record should have been ready for filing by the due date, 9th March 2006. However, it is

[3] See paragraph 6 of the affidavit in support of the application.

apparent that the appellant paid for the transcript on Tuesday 28th March 2006, the date on which the application to set aside the judgment was dismissed. The appellant complains that he did not receive the transcript until 31st March 2006. A proper application was only made on 9th June 2006. This was some 91 days after the date on which the Record should have been filed pursuant to rules 62.12(2) and 70 days after the receipt of the transcript.

[12] In his affidavit, the appellant stated that he did not appreciate that the claim was served outside of the prescribed period until March 2006. This, he stated, was when the court's copy of the filed claim was obtained for the purpose of preparing the Record of Appeal. He stated that the copy of the claim which was in his possession did not contain the return of the service and no affidavit of service was filed in the case.[4] He stated, further, that after he received notification that the transcripts were ready, his solicitor left the country for a period of 2 weeks. According the appellant,[5] it was upon the return of his solicitor on 9th March 2006 that they appreciated that the prescription point could have been raised because of the decision of this Court in Charles et al v Windjammer Landing Company Limited et al.[6] This case, and, in addition, David Sweetnam and Another v The Government of St. Lucia and Another[7] decided, on the interpretation of article 2085 of the Civil Code, that it was the service, rather than the mere filing, of a claim form, within 3 years of the accrual of an action in tort that created a civil interruption whereby the claim would not be automatically extinguished on the ground of prescription.

[13] The appellant deposed that it was for the foregoing reason that he decided to apply to set aside the judgment. According to him, his hope was that the application to set aside would have convinced the respondents to withdraw the case, thereby preventing the unnecessary expenditure of monies for the

[4] See paragraph 5 of the affidavit in support of the application.
[5] See paragraphs 3 and 6 of the affidavit in support of the application.
[6] St. Lucia Civil Appeal No. 7 of 2005 (March 2006).
[7] St. Lucia Civil Appeal No. 42 of 2005 (28 October 2005, Gordon JA.).

preparation of the appeal and to lessen the burden on the court to sift through bundles of documents.[8] The appellant further deposed that when the court indicated that the application to set aside the judgment was an inappropriate procedure, it became necessary to apply to amend the Notice of Appeal, in order to include the prescription ground. It also became necessary to apply for an extension of time for filing the Record.[9] The appellant also deposed[10] that the Notice of Appeal was filed within the time fixed for filing it and had it not been for the application to set aside the judgment, the Record of appeal would have been filed within the time fixed for its filing.

[14] In effect, the appellant has set up 2 distinct reasons why the court should grant the application. One reason was the enlightenment provided in the decisions in Charles et al and in David Sweetnam. In relation to the application to amend the Notice of Appeal, the appellant stated that he should be excused because, in his own words,[11] he intended to have the benefit of a novel point of law on prescription which was discovered in Charles et al. He said that hitherto, it was commonly and erroneously thought throughout the legal community in St. Lucia that the mere filing of the claim was sufficient to create a civil interruption.[12] The decisions in Charles et al and David Sweetnam were pronounced by this Court in October 2005.

[15] I did not think that the foregoing statements provided sufficiently good reasons for delay. In the first place, as Mr. Theodore, learned Counsel for the respondents, pointed out, a plea based on a misapprehension of the law is unavailing. In the second place, articles 2085 and 2122(2) are, and were always, clear that the civil interruption for tortuous claims is prescribed by 3 years, and that prescription is a function of the service rather than of the filing of the claim. They state:

> "2085. A judicial demand in proper form, served upon the person whose

[8] See paragraph 7 of the affidavit in support of the application.
[9] See paragraph 8 of the affidavit in support of the application.
[10] In paragraph 10 of the affidavit in support of the application.
[11] In paragraph 3 of the affidavit in support of the application.
[12] See paragraph 4 of the affidavit in support of the application.

> prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption.
>
> "2122(2). The following actions are prescribed by three years (1) … (2) For damages resulting from delicts or quasi delicts, whenever other provisions do not apply;".

[16] The second reason that the appellant advanced was referred to in paragraphs 12 and 13 of this judgment. It indicates a deliberate decision by the appellant not to pursue the preparation of the Record of Appeal and not to make the application to amend the Notice of Appeal in a timely manner, with the hope that the respondents would have relented, thereby obviating the expenditure of monies or the necessity to comply with the Rules. It was a decision to disregard the rules of practice on a hope or expectation, mindless of the obvious consequences for the non-compliance. This, in my view, was an inadequate ground for excusing non-compliance with stipulated provisions of the Rules.[13]

[17] The fourth matter which informed my decision to dismiss the application followed from Mr. Theodore's submission that, with respect to the application to extend the time for filing the Record, the appellant had to get around rule 26.8 of the Rules in order to succeed. This rule provides for the making of applications for relief from any sanction imposed for failure to comply with any rule order or direction. Rule 26.8(1)(a) states that the application must be made promptly. Rule 26.8(2) permits the court grant relief only if it is satisfied that the failure was not intentional; that there is a good explanation for the failure; and the party in default generally complied with all other relevant rules, practice directions, orders or directions.

[18] Mr. St. Clair submitted that rule 26.8 does not apply in the present proceedings. This, he said, was because it specifically refers to relief from sanctions for failure to comply with a rule, but rule 62.12(2), which prescribes the time within which to

[13] See the judgment of Barrow JA in Dominica Agricultural and Industrial Development Bank v Mavis Williams, Dominica Civil Appeal No. 20 of 2005 (18 September 2006.), particularly paragraphs 10 to 22 of the judgment.

file the Record of Appeal, does not impose any sanction. He said, however, that the check-list that was used by the English Court of Appeal in Sayers v Clarke Walker (a firm)[14] would be applicable to determine whether the time stipulated by the rules should be extended.[15]

[19] In Sayers, Brooke LJ recommended the check-list which CPR r 3.9 of the English Rules provides as the criteria for determining whether time that is stipulated in the Rules should be extended. CPR r 3.9 is similar to rule 26.8 of our Rules. This Court held in the Dominica Agricultural and Industrial Development Bank case[16] that the relevant check-list is that which is provided in rule 26.8 of our rules.

[20] Rule 26.8(1)(a) is stated in imperative terms. It requires an application for extension of time to be made promptly. I have found that the present application was not made promptly and that the explanation for the delay is unconvincing. Rule 26.8(2), which states the only criteria on which the court may grant relief for non-compliance is compendious. The court may only extend time if all criteria are satisfied. I have found that the applicant has not provided a good explanation for the non-compliance and that the failure to comply was the result of a deliberate decision. Barrow JA held in Dominica Agricultural and Industrial Development Bank that the court would not extend time within which to appeal if it is satisfied that failure to appeal within the stipulated time was deliberate or intentional.[17] In the foregoing premises, the procedural failures mentioned in this judgment were sufficient grounds on which to dismiss the application for the 2 orders prayed. I would go further and find that the failures amounted to an abuse of process.

[14] [2002] EWCA Civ 645; [2002] 1 WLR 3095.
[15] The English Court of Appeal stated, at paragraph 21 of the judgment, that where a rule stipulates the time within which a procedural step is to be taken, although no sanction is expressly stated for failure to comply with that rule, non-compliance with it within the time stipulated would have the same effect as if a sanction were imposed because of the consequence of the court's possible refusal or unwillingness to grant an extension for the failure to comply with the time limits set by the rule.
[16] Op. cit. in note 13 above.
[17] See paragraphs 19 to 23 of the judgment.

[21] In Dominica Agricultural and Industrial Development Bank, this Court noted[18] the principle in Choraria v Sethia,[19] which states that before a court strikes out a case for abuse of process, the court must be satisfied that it is fair to do so. At first blush, I am not of the view that the action of dismissing this application is the striking out of the case. Rather, it is a dismissal of an application to amend the Notice of Appeal and to extend the time to file the Record of appeal. If I am wrong, however, I think that the decision to dismiss the application is fair because there was a trial of the case, which as this court found in Dominica Agricultural and Industrial Development Bank,[20] was significantly less draconian than striking out a case in which there was no trial. I also think that the decision to dismiss the application is fair because compliance with the rules or the taking of steps to make and prosecute a proper application within a reasonable time was within the power of the appellant. He made a decision, based on a hope, not to act in accordance with the Rules. As this court also found in Dominica Agricultural and Industrial Development Bank,[21] it is fair to deny relief to a litigant who deliberately or intentionally defaults.

[22] It was in the foregoing premises that I dismissed the application and ordered the appellants to pay $500.00 costs on the application.

Hugh A. Rawlins
Justice of Appeal

[18] At paragraph 24 of the judgment.
[19] [1998] EWCA Civ 24.
[20] See paragraph 24 of the judgment.
[21] See paragraph 24 of the judgment.