SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.32 OF 2005

BETWEEN:

RICHARD FREDERICK

Appellant

and

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

Respondents

Before:

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| The Hon. Mr. Michael Gordon, QC | Justice of Appeal |
| The Hon. Mr. Denys Barrow, SC | Justice of Appeal |
| The Hon. Mr. Hugh Rawlins | Justice of Appeal |

Appearances:

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

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2006: October 17;
2007: January 15

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JUDGMENT

[1] BARROW, J.A.: The appellant applies to the full court to vary or discharge the decision of Rawlins J.A., sitting as a single judge of this court, dismissing the appellant's application for (1) leave to amend the notice of appeal and (2) an extension of time to file and serve

the record of appeal.[1] In his judgment dated 16 October 2006 Rawlins J.A. gave full reasons for the decision he had earlier pronounced.

[2] In a judgment delivered on 22nd July 2005 Shanks J. (Ag.) ordered the appellant, who was the defendant in the High Court proceedings, to pay damages for assault and trespass to three claimants, now the respondents. The appellant filed a notice of appeal on 19th August 2005. On 26th January 2006 the Registrar of the High Court notified the appellant's lawyers that the transcript of the notes of evidence was available. Rule 62.12 (3) of the Civil Procedure Rules 2000 (CPR 2000) states that within 42 days of receipt of such notice "the appellant must prepare and file with the court office" six sets of the record comprising the documents specified in the rule.

[3] The time for filing the record of appeal expired on 9th March 2006 without the appellant having filed the record. Instead the appellant had filed an application in the court of appeal to set aside the judgment of Shanks J. on the ground, which he said he had recently become aware was available to him, that the claim in the High Court had been prescribed and was incapable of being revived, because the claim had not been served within the 3 year period limited by statute for the service of a claim in an action in delict.

[4] The provision upon which the appellant seeks to rely in his appeal and on which he relies in this application is article 2085 of the Civil Procedure Code[2], which states:

> "2085. A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when personal service is not required, creates a civil interruption."

Article 2122 provides that actions for damages resulting from delicts or quasi-delicts are prescribed by three years. The appellant had previously thought, allegedly in common with other members of the legal profession, that the filing of the claim form within 3 years interrupted prescription. He deposed that it was the pronouncement of a recent decision of

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[1] The power of the court to vary or discharge the decision of a single judge on an application for an extension of time is contained in rule 62.16 (4) of the Civil Procedure Rules 2000

[2] Cap. 242 of the Revised Laws of St. Lucia, 1957

this court[3] that alerted him to the knowledge that it was the service of the claim form and not its issue alone that interrupted prescription. Counsel for the appellant submitted that a claim that is prescribed is extinguished, it is not merely that the remedy is barred, and counsel for the respondents did not demur. As will be examined later, the position of the appellant is that because the claim was extinguished the judgment of Shanks J. allowing the claim was a nullity.

[5] Rawlins J.A. observed that it should have been obvious that a procedural application to set aside a judgment of the High Court was a wholly incorrect procedure and especially so in the face of an existing appeal. No doubt for that reason a single judge of this court had earlier dismissed the procedural application to set aside the High Court judgment; on 28th March 2006. In the course of the hearing of the instant application counsel for the appellant repeatedly tried, without having applied to vary that decision, to argue that that decision was wrong. In my view that was a wholly impermissible attempt.

[6] On 5th April 2006 the appellant filed an application in which he sought an order extending time (he was now 27 days out of time) within which to file and serve the record of appeal (and to amend the notice of appeal to add the prescription point as a ground of appeal). When the appellant's application for an extension of time came on for hearing before a single justice of appeal, on 16th April 2006, no one appeared for the appellant and the judge dismissed the application for want of prosecution.

[7] On 9th June 2006 the appellant filed another application to extend time for filing the record of appeal and to amend the grounds of appeal. By now the appellant was 92 days out of time for filing the record. On 13th June 2006 Rawlins J.A. refused that application.

[8] The reasons for the decision are clearly set out in the judgment of Rawlins J.A. dated 16th October 2006. Essentially the justice of appeal decided that the application "was abusive of the process of the court on a compendium of grounds".[4] Firstly, the judge pointed to the

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[3] Charles v Windjammer Landing Company Limited, St. Lucia Civil Appeal No. 7 of 2005 (judgment delivered March 2006)

[4] At paragraph [6] of the judgment.

failure of the appellant to state in the application, as required by rule 11.7 (1) of CPR 2000, the grounds on which it was sought. Secondly, the judge held that filing an identical application to the one dismissed for want of prosecution was an improper procedure and that the appellant should have applied to restore the dismissed application and supported that application with an affidavit giving reasons why the application had not been prosecuted when it came before the court. Thirdly, the judge found that there was inordinate delay in bringing the application without a convincing explanation for the delay. The judge gave extensive consideration to this last aspect.

[9] In Dominica Agricultural and Industrial Development Bank v Mavis Williams[5] this court adopted the position taken by the English Court of Appeal in Sayers v Clarke Walker (a firm)[6] that where a rule stipulates a time for doing something, although no sanction is expressly stated for failure to comply with the rule, non-compliance with the time limit has the same effect as if a sanction were expressly imposed because the consequence of such non-compliance was the loss of the right or ability to do the thing. Consistent with the English decision this court decided in the Dominica Agricultural Bank case that for a defaulting litigant to obtain relief from sanction he must satisfy the requirements contained in rule 26.8 of our CPR 2000. This court decided, however, that the requirements of our rule are distinctly more stringent than those in the comparable English rule 3.9.[7] The essential difference is that the English provision gives a discretion, upon consideration of the listed factors, to grant relief whereas our rule lays down pre-conditions, which *must* be satisfied before the court may go on to consider the factors in the list. One of those pre-conditions is that the application must be made promptly.[8] Another pre-condition is that there must be a good explanation for the failure of the litigant to comply with the rule.[9] The judge found the appellant satisfied neither pre-condition.

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[5] Dominica Civil Appeal No. 20 of 2005 (judgment delivered 18 September 2006)
[6] [2002] EWCA Civ 645; [2002] 1 WLR 3095
[7] At paragraph [19]
[8] rule 26.8 (1)(a).
[9] rule 26.8 (2)(b)

[10] Further, Rawlins J.A. noted that upon the appellant's own evidence he deliberately chose not to file the record of appeal but, instead, chose to apply to set aside the judgment of the High Court. As Rawlins J.A. put it[10]:

> "It indicates a deliberate decision by the appellant not to pursue the preparation of the Record 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."

The judge noted[11] that this court had concluded in the Dominica Agricultural Bank case that even if the terms of rule 26.8 had not been conclusive on the matter, and they were, it is fair to deny relief to a litigant who deliberately or intentionally defaults because such conduct is not mere technical non-compliance but an abuse of process.

[11] On the hearing by the full court of this application to vary the decision of Rawlins J.A., it emerged that the real focus of the arguments of counsel for the appellant was not the merits of the decision that the single judge gave against the appellant – counsel confessed to having not read the Dominica Agricultural Bank case – but on the proposition that the judgment of Shanks J was a nullity and that this court had no choice but to set it aside on appeal. The appellant submitted that this was the effect of the decision of the Privy Council in Leymon Strachan v The Gleaner Company Limited.[12]

[12] In that case the plaintiff appealed to the Privy Council from a judgment of the Court of Appeal of Jamaica dismissing his appeal from the refusal of one High Court judge to set aside the order of another High Court judge as being made without jurisdiction. Their Lordships decided that the judge did in fact have jurisdiction to make the order that the plaintiff sought to set aside. Although the Board held that the judge had jurisdiction they

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[10] At paragraph [16]
[11] At paragraph [21]
[12] Privy Council Appeal No 22 of 2004 (judgment delivered 25th July 2005)

went on nevertheless to consider[13] whether, if the judge had had no jurisdiction to make the order, a judge of co-ordinate jurisdiction would have had jurisdiction to set it aside as a nullity.

[13] In referring to the distinction that is drawn between orders that are described as "irregularities" and those described as "nullities" their Lordships regarded the terminology as confusing[14] and the use of description "nullities" as inaccurate. The true position, their Lordships stated, is that an order described as a nullity is one that the affected party is entitled to have set aside as of right. In that situation there is no power in a party to waive the defect. Their Lordships described as unfortunate and as since "doubted" the view that Lord Greene MR expressed in Craig v Kanssen[15] that a court of first instance has an inherent jurisdiction to set aside an order made in proceedings that were not served on a defendant at all and that it was not necessary to appeal from it. Their Lordships described as "mistaken"[16] the view of Lord Greene that perhaps such an order did not have "sufficient existence to found an appeal."

[14] Counsel for the appellant submitted "it can also be argued that this case is one where according to Lord Upjohn (sic) in Craig v Kanssen, proceedings appear (1) duly issued but has (sic) failed to comply with a statutory requirement namely the civil code and/or (2) proceedings which never started at all owing to some fundamental defect in issuing them. In such cases Lord Upjohn stated that such a defect is so fundamental that they made the whole proceedings a nullity."[17] Counsel for the appellant was greatly taken with the remark made by Danckwerts LJ (not Upjohn LJ) in In re Pritchard that in proceedings that have not been properly begun or served the originating process has no more effect to commence proceedings than a dog licence.[18]

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[13] At paragraph 24.
[14] At paragraph 24
[15] [1943] 1 KB 256
[16] At paragraph 25
[17] Appellant's skeleton argument filed 12th October 2006 at p. 6. The reference that counsel intended to make was to In re Pritchard [1963] 1 Ch 502
[18] Cited in the Strachan case at paragraph 26

[15] After referring to that view in the Strachan case the Privy Council continued:

> "27. In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.
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> "28. An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess."

[16] The Privy Council concluded in the Strachan case[19] that whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, that is an error of law or fact that an appellate court can correct; but by making the error the judge does not exceed his jurisdiction and a judge of co-ordinate jurisdiction does not have power to correct it. In the case before them, the Privy Council declared, the judge held that he had jurisdiction to make the order he did. The Privy Council declared:[20]

> "If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata*."

[17] Applied to the instant case, the effect of that decision is that unless and until this court reverses the decision of Shanks J it is binding on the appellant. The appellant is therefore

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[19] At paragraph 32
[20] At paragraph 33

not permitted to assert that the decision is a nullity and has no more effect than a dog licence. He can only have the decision rendered a nullity by prosecuting an appeal and obtaining an order of this court reversing the decision. If he fails to do so the decision stands.

[18] It follows that the appellant cannot succeed in having the decision of Rawlins J.A. varied or discharged on the basis that the judgment of Shanks J is a nullity. It is not the law, as the appellant implied by his argument, that neither the single judge nor the full court has any choice in the matter but are bound to set aside the decision of Shanks J. An appellant who allows his appeal to abort is in the same position as a defendant who did not appeal: he is bound by the decision, which is *res judicata*.

[19] Accordingly, I would dismiss the application to vary or discharge the order refusing an extension of time for filing the record of appeal, with costs to the respondents in the sum of $1,000.00. The substantive appeal cannot proceed without a record of appeal. Therefore, in the exercise of the court's case management powers[21] I would order that the appeal be dismissed.

Denys Barrow, SC
Justice of Appeal

I concur

Michael Gordon, QC
Justice of Appeal

I concur

Hugh A. Rawlins
Justice of Appeal

[21] See rule 62.20 (1)