SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.36 OF 2005

BETWEEN:

[1] EMMANUELA JN PHILLIP
[2] PATRICIA CALIXTE
[3] THERESA MOORE
[4] FRANCIS JN PHILLIP
[5] MARTINUS JN PHILLIP
[6] WINSTON JN PHILLIP

Appellants

and

MARTHA JN PHILLIP

Respondent

On written submissions:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

Representation:
Monplaisir & Company for the Appellants
Peter I. Foster & Associates for the Respondent

2007: March 8.

JUDGMENT

[13] BARROW, J.A.: It was because of impecuniosity, the appellants alleged, that they failed to file the record of appeal within the time limited by the Civil Procedure Rules 2000 (CPR 2000). They applied for an extension of time of 120 days within which to file the record. However, before considering the interesting question of how to deal with lack of means as a reason for failing to comply with the rules, I must first be satisfied that it is a genuine reason because the respondent contended that it was not.

[14] The appeal is against a decision of Shanks J (Ag.) given on 29 July 2005 in favour of the respondent on a claim that was commenced 5 years earlier. The claim was brought against the respondent in the names of her mother and some of her siblings claiming the respondent had procured the mother to execute a deed of sale in the respondent's favour by fraud. The appeal was filed in September 2005 and the registrar of the High Court served the notice that the transcript was available on 6th October 2006. Rule 62.12 (3) states that an appellant must file the record of appeal within 42 days of receipt of the registrar's notice. The time for filing therefore expired on 17th November 2006. As the respondent framed it, the appellants did nothing before time expired but waited 19 days after time expired to file the present application, on 6th December 2006, asking for an extension of time.

[15] Initially the application was supported only by the affidavit of a secretary in the office of the appellants' lawyer who stated that their office had notified the third named appellant, who lived in England, of the availability of the transcript and that appellant explained that in addition to having had problems with her telephone she had lost her job because of prolonged illness and needed time to settle her retainer. It was stated in the notice of application that the third named appellant, Mrs. Moore, had assumed responsibility for the appeal.

[16] Subsequently Mrs. Moore filed an affidavit, on 15th January 2007, which amplified these matters. Mrs. Moore stated she was the eldest child and the leader of the family. When she gave counsel instructions to file an appeal counsel told her that a transcript of proceedings would be prepared and a fee would be charged. However, she deposed, "during the time of the preparation of the transcript that is on 7th September 2005 and 26th September 2006 [she] took ill and had to have prolonged leave of absence from work. The nature and extent of [her] illness promoted early retirement from work."

[17] Then her sister died, Mrs. Moore stated, and the main financial responsibility for the funeral fell on Mrs. Moore despite the contributions made by her siblings. This was in addition to the financial responsibility she and her husband carried of the day-to-day care for her mother and paying the mortgage on the house at Rodney Heights, Gros Islet, in which the mother lived. Because of these unforeseen circumstances she was unable to pay the interim retainer due to her lawyer for him to prepare the record of appeal. She said she was making arrangements to pay by instalments and consequently required an extension of 60 days (from the date of her affidavit) to "straighten" her affairs as she was not working and received only a pension as income. She intended to apply for alternative work, which would assist her to pay.

[18] In response the respondent filed an affidavit that stated the fourth named appellant had testified on her behalf at the trial and had informed her that he gave no one permission to include his name in the High Court or appellate proceedings. The respondent told of the steps she took to enforce the judgment given in her favour and to see that the appeal against her proceed with despatch, including monitoring the preparation of the transcript. The respondent's position was that if the appellants could not afford to file the record or pay their solicitors the respondent should "not be left hanging on unable to deal with [her] property until they find the money." This was terribly unfair to her, she stated, and had led to the appeal being not listed for the February 2007 sitting of the court of appeal.

[19] The respondent stated that only Mrs. Moore lived in England and all the other appellants lived in St. Lucia. She related information given to her by another sister (not a party) that made her challenge the truth of Mrs. Moore's one-year illness. She also noted that Mrs. Moore filed no document to support her claim of illness. In addition, the respondent stated Mrs. Moore was about 65 to 69 years of age so the respondent was surprised that Mrs. Moore should say early retirement overtook her.

[20] As regards the death of the sister for whose funeral Mrs. Moore said she bore the "main financial responsibility" the respondent stated that the sister died on 14th December 2006, more than six weeks after the record of appeal was due to be filed. The respondent exhibited a copy of the death certificate to prove the date of death. This could not be the reason for the delay, the respondent noted, and expressed her sadness that Mrs. Moore used their sister's death as a reason for her non-compliance because it was an outright untruth.

[21] Further, the respondent stated, Mrs. Moore did not have main responsibility for the funeral but she, the respondent, had. She paid for everything from the outset, from casket to drinks, a total of $11,229.74. She exhibited a letter that she said was issued by Mrs. Moore covering a payment of $5,000.00 comprising $1,000.00 from each of 5 family members. The respondent also exhibited a receipt issued in her name by the funeral home for $7,630.00 as full payment of funeral expenses. The respondent relied on that letter as confirmation that she, and not Mrs. Moore, was the one who bore the main financial responsibility for the cost of the funeral. The respondent also stated that Mrs. Moore arrived in St. Lucia the day before the funeral, from which one infers that all arrangements would have been made before Mrs. Moore arrived.

[22] The respondent's affidavit ended with the assertions that the reasons given for failing to file the record are untrue and that the delay of 141 days that the appellants are seeking is unfair to her. There are six appellants, the respondent noted, and if none of them has the money to pursue the appeal they should not have filed it. Finally, the respondent said, Mrs. Moore did not even say she had the money but that she would be trying to get a job to get the money and this is uncertain.

[23] The submissions for the appellants began, quite improperly, with statements of fact that should have been given in an affidavit, that Mrs. Moore had since the filing of her affidavit of 16th January 2007 faxed to her lawyers a medical certificate

and had since put the lawyers in funds sufficient to acquire the transcript. The submissions stated there was still a balance due from Mrs. Moore. The medical certificate was attached to the submissions. It was dated 9th February 2007 and said that Mrs. Moore was suffering from back pain with sciatica from 2nd September 2006 and was unable to work till 10th October 2006. Rather than supporting Mrs. Moore's claim of illness for a year the medical certificate tended to support the respondent's challenge, in response to which the certificate was submitted, that Mrs. Moore was not ill for the protracted period that she claimed. Apart from imparting the new 'facts' the submissions contained no treatment or interpretation of the facts.

[24] In its treatment of the law the submissions on behalf of the appellants referred to this court's decision in Dominica Agricultural and Industrial Development Bank v Mavis Williams[1] but only for the fact that the court "decided that relief from sanctions for non-compliance is found in … Rule 26.8" which the submissions reproduced. The relevant portions of rule 26.8 read as follows:

> (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
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) 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 –
>
> (a) the effect which the granting of relief or not would have on each party;
>
> (b) the interests of the administration of justice;

[1] Dominica Civil Appeal No 20 of 2005, judgment delivered 18 September 2006

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the failure to comply was due to the party or the party's legal practitioner; and

(e) whether the trial date or any likely trial date can still be met if relief is granted.

[13] On this application the issues that arise are whether the application for relief from sanctions was made promptly and whether there is a good explanation for the failure to comply with the rule as to time for filing the record.

[14] Application for relief from sanctions was made promptly, the appellants submitted, because a delay of 19 days in making the application was to be so regarded given that Mrs. Moore lived in England and there was difficulty in communicating with her. The appellants submitted that their failure to comply was not intentional but was due to circumstances beyond Mrs. Moore's control as she was not aware, when she instructed her lawyers to file the appeal, that she would suffer prolonged illness and loss of her job as well as additional expenses of coping with her illness.

[15] As regards the requirement of a good explanation for delay the appellants relied on the following passage from Blackstone Civil Procedure:

> "It is common in applications for relief from sanctions for the defaulting party to be unable to point to any adequate reason for the delay. This is sometimes because no reasons are advanced, and sometimes because the 'reasons' suggested on behalf of the defaulting party are regarded as unconvincing or inadequate by the court. At one time, under the old rules, it was held that once it was established that there was no adequate explanation for the delay, there was no material on which the court could be asked to exercise its discretion to allow more time (or relief from sanctions), with the result that the sanction took effect. This rather harsh approach was rejected decisively by the Court of Appeal in *Finnegan v Parkside Health Authority* [1998] 1 WLR 411. In that case it was held that the court considering an application for more time in the absence of any good reason for the delay still had to consider all the circumstances of the case, recognising the overriding principle that justice had to be done, and the absence of a good reason was just one of the factors that had to be

weighed. The reference to the overriding objective obviously shows the court had the principles of the CPR in mind."

[16] "Arrangements for the record to be filed are being processed pending the balance of the retainer", according to the submissions. Further, the appellants submitted the court must have regard to the effect of granting relief on each party in the context of this dispute between family members in which the eventual restoration of harmony must be considered, and no prejudice would be suffered by the respondent who is in occupation of the property that was the subject of the litigation. While conceding that the court must consider prejudice to the due administration of justice the appellants argued that although the appeal could have been ready for listing for the court's sitting in February 2007 a review of the list showed it was going to be a full sitting including three cases that were adjourned from the October 2006 sitting so it was unlikely that this case could have been heard in February 2007. Consequently there was no prejudice to the administration of justice. The concluding submissions twice expressed confidence that the record would be ready by 15th March 2007 but in both instances the lawyers for the appellants made it clear this was provided the balance of the retainer was remitted.

[17] In contrast to the avoidance in the appellants' submissions of any treatment of the facts, the submissions for the respondent dealt very fully with the facts. I consider along with those submissions the factual challenges that the respondent made in her affidavit. First, I am afraid I can place no reliance on the truth of Mrs. Moore's primary explanation for the delay. The respondent challenged Mrs. Moore's claim of protracted illness and there was an evidential burden upon Mrs. Moore, as the party asserting the fact, to prove it on a balance of probability. Mrs. Moore failed to do so. As I have observed, the medical certificate of illness that she sent proved illness and disability for a month, not for the year that she claimed. I therefore do not believe Mrs. Moore was ill for a year, I do not believe she lost her job as a result of protracted illness and I do not believe Mrs. Moore was additionally

burdened by expenses attendant upon her illness to the extent that this rendered her unable to pay the lawyers' retainer.

[18] Second, I reject the explanation that the death of her sister caused Mrs. Moore to delay in having the record prepared. The respondent's proof of the date of death of their sister put the matter beyond doubt. Mrs. Moore did not state in her affidavit when the sister died and I conclude that was deliberate since the revelation that the death occurred on 14th December 2006 would have immediately beggared belief that that event could have caused or contributed to a failure that occurred on 17th November 2006.

[19] Third, I reject as untrue Mrs. Moore's statement that she bore the main financial responsibility for the sister's funeral because I believe the respondent's uncontradicted evidence, supported by some documentation, that she was the one who bore the main financial responsibility for the funeral. Had Mrs. Moore referred to the contributions made by her and the siblings on her side of the dispute as a strain on their financial resources, this would have been credible, even if of a lesser impact. Instead, she deliberately overreached and this further diminished the credibility of her statements.

[20] Following from those findings of fact there arises for consideration a fundamental fact that has not been mentioned. This is the matter of the appellants' failure to deposit with their lawyers the cost of the transcript and the retainer to enable the preparation of the record at an early stage. It was more than a year after the appeal was filed that the transcript became available. I have rejected the assertion that Mrs. Moore was ill for this entire period. That finding leaves towering the fact that the appellants had all that time to raise the money to pay for the cost of the transcript and the retainer. They chose not to use that time to raise funds. The consequence was that when they were confronted one year later with the need to raise funds they could not do so in the time remaining.

[21] There is a statement in the submissions by the lawyers for the appellants that they have been put in funds and have procured the transcript. The court was asked to allow until 15th (sometimes stated as 17th) March 2007 to see if the appellants pay the balance of the lawyers' interim retainer, which will determine whether the lawyers will prepare the record. The court was asked to forgive the delay that has already occurred and to further wait and see. That cannot be an acceptable course. The lawyers for the appellants, as they were entitled to do, have obviously taken a position that they will not expose themselves to the risk of unpaid fees by doing work in reliance on the promise of future payment. The question is whether the court and the respondent should be required to accommodate significant non-compliance with the time lines specified by the rules because the appellants failed to sensibly organise their financial affairs. The answer must be no. The court cannot uphold the attempt by the appellants to avoid responsibility for their choice not to use the year they had in which to arrange their financial affairs.

[22] To add to that perspective, as a matter of general judicial knowledge I reckon the cost of the transcript of proceedings that were heard on two days were in the region of $1,000.00. Nothing has been put before this court to enable me to believe that between four of the appellants (the mother is bedridden and the fourth named appellant was allegedly wrongly joined) they could not raise that money even in the limited time that was available to them.

[23] Had this been a case of genuine impecuniosity I would have needed to analyse some policy and indeed philosophical considerations regarding the proper approach to doing justice pursuant to the overriding objective where there is an inequality of financial resources between the parties. As I have conveyed, I am satisfied that this is not a case in which impecuniosity was the operating cause for non-compliance. Even if I were to leave out of account the major factor that the appellants chose not to act reasonably and organize their finances in the year they had to do so, counsel for the respondent's point is well made: are all the other appellants impecunious? Why have not the other appellants raised or assisted in

raising the necessary funds between them? Have they made any efforts in that regard? What efforts? Why has not one of them said what they, the others, did? It is possible that there are favourable answers to these questions. But that is sheer speculation. It is equally open to speculation that the other appellants were simply not sufficiently interested to make the necessary effort.

[24] It was the duty of the appellants on an application for relief from sanctions for non-compliance to satisfy the court, in accordance with rule 26.8 (2)(b), that there was a good explanation for the failure to comply. They have failed to do so. It is on that basis that I must determine this application. The court must maintain consistency and credibility in its application of CPR 2000 and not yield to the temptation to allow the appellants the indulgence of just a few more days to see what will happen.

[25] The reliance by counsel for the appellants on the principle stated in the extract from Blackstone based upon the decision in Finnegan v Parkside Health Authority[2] is misconceived. This court has stated on a number of occasions that CPR 2000 contains significant differences from the English Civil Procedure Rules on the matter of non-compliance. This appears clearly in the following passage from the Dominica Agricultural Bank case on which the lawyers for both sides relied. After referring to the ethos of CPR 2000 that seeks to eliminate casual non-compliance with clear rules the judgment continued:

> "It is precisely to safeguard those principles that the provisions that are contained in rule 26.8 were crafted, in striking contrast to the provisions contained in the English rules[3], in specifically non-discretionary terms: "the court may grant relief only if it is satisfied …"[4] Apart, therefore, from providing the criteria by which to determine the present application, rule 26.8 has a wider importance. Rule 26.8 demonstrates the paradigm shift in the culture of litigation that CPR 2000 is intended to accomplish by, along with other things, its emphasis on compliance with the rules. Rule 26.8 ordains that the sanctions imposed[5] for non-compliance shall not be

[2] [1998] 1 WLR 411
[3] The comparable provisions in the English CPR appear in rule 52
[4] rule 26.8 (2).
[5] See for example rule 13default judgment and rule 29 witness statements

> relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down. It bears repeating that the rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria. The court is no longer able to exercise, as it did in the past, an "unfettered discretion"[6] and relieve against sanctions where the defaulter fails to satisfy a particular criterion.[7] The court has no power to overlook inordinate delay or intentional non-compliance."

[26] The principle applies equally, unlike the position in England as expressed in Finnegan v Parkside, to the absence of a good explanation for failure to comply: the court has no power to overlook that requirement. The same point was made in Nevis Island Administration v La Copropriete du Navire J31[8], which was cited in the Dominica Agricultural Bank case.

[27] In the circumstances I refuse the application for the extension of time within which to file the record. It follows that the appeal is incapable of proceeding. In exercise of the court's case management powers contained in rule 26.3 (1)(a) I strike out the appeal with costs of this application to the respondent in the sum of $1,000.00. The respondent is left to decide whether she wishes to proceed with the cross-appeal that she filed.

Denys Barrow, SC
Justice of Appeal

[6] Per Singh JA in Quillen v Harney Westwood & Reigels at (No.1) (1995) 58 WIR 143 at page 145
[7] Which is the footing on which the court granted relief in Quillen v Harney Westwood & Reigels.
[8] Saint Christopher & Nevis Civil Appeal No. 7 of 2005 delivered April 3, 2005