SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2011/009

BETWEEN:

CARLEEN PEMBERTON

Appellant

and

MARK BRANTLEY

Respondent

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal

On the written submissions of:

Cozier & Associates on behalf of the Applicant/ Appellant
Daniel Brantley & Associates on behalf of the Respondent.

2011: October 14.

Civil Appeal - Notice of Appeal filed out of time - application for extension of time to file appeal - CPR 26.1(2) (k) and 26.9 - CPR 62.5 - length of delay - reasons for delay reasonable prospect of success on appeal - application for stay pending appeal where appeal struck out

JUDGMENT

[1] PEREIRA, J.A: On a claim for libel commenced on 14th April 2009 by the respondent against the applicant, a judgment in default of defence was entered on 9th November 2009. Following a hearing on assessment of damages conducted by the Master on 27th October 2011, the Learned Master, on 5th May, 2011 delivered judgment on the assessment and awarded the respondent damages in the sum of $70,000.00.

[2] On 6th May 2011 the respondent by letter demanded payment of the judgment debt. The applicant made no response to this letter neither was the judgment debt satisfied or arrangements made for its satisfaction. On 26th May 2011, the respondent launched enforcement proceedings by way of Judgment Summons. The Judgment Summons was given a hearing date of 7th July, 2011.

[3] On 22nd June 2011, the applicant filed a Notice of Appeal against the quantum of damages notwithstanding that the time for so doing [being forty two [42] days under CPR] had expired on 17th June 2011. No application for an extension of time was then filed.

[4] On 30th June 2011, seemingly in direct response to the enforcement proceedings, the applicant applied for a stay of the judgment of the Learned Master primarily on the basis that if a stay is not granted that the 'Applicant will be forced to pay damages to the Respondent which may be reduced by half on appeal'[1] and that 'as a result this would render any judgment in the Applicant's favour at the Court of Appeal reducing the quantum of damages nugatory'

[5] On 14th July 2011, the respondent gave Notice of Objection to the application for a stay.

[6] On 21st July 2011, the respondent went further and filed an application:

(a) to strike out the Notice of Appeal, taking the point that the Notice of Appeal had been filed out of time as per the requirement of the Rules; and

(b) to dismiss the application for a stay, primarily on the grounds that there was no valid appeal, as well as the fact that no sufficient basis had been put forward to show that there was a risk of prejudice to the applicant were the stay not granted.

[1] See: Paras. 17 and 18 of the Application for Stay.

[7] The Affidavit of Service filed by the respondent shows that the application to strike out the appeal, supporting evidence and written submissions were served on the applicant on the same day, (21st July, 2011).

[8] On 26th July 2011, the applicant's application for a stay, and the respondent's application to strike out the Notice of Appeal came up for consideration before Mitchell JA [Ag.]. At that time the applicant had still not made an application for extending the time for filing the Notice of Appeal. Accordingly, on that date Mitchell JA [Ag.] made an order in which the applicant was directed to show cause why the appeal should not be struck out and adjourned the hearing of the applications to the first case management date in September, 2011. That order was faxed to the legal practitioners for the applicant and the respondent on 28th July 2011.

[9] Presumably, this order stirred the applicant into action. But even so, it took another twelve [12] days, namely on 10th August 2011, to make application seeking an extension of time for filing the Notice of Appeal and to file Skeleton Arguments in support of that application.

[10] The applications came up before me for consideration on 6th October 2011, being the first case management date in the new law term which started on 16th September 2011. This later October date was due to the scheduled consecutive sittings of the Court in Antigua and Barbuda and the Virgin Islands in the latter weeks of September.

[11] On 6th October 2011, I then had before me, an opposing affidavit and written submissions filed by the respondent on 12th September, 2011 in respect of the application for extension of time. Presumably, the respondent was served with or became aware of this application at some point. No affidavit of service as required by the Rules and Practice Directions, has turned up on the Court's record.

The Notice of Appeal and the Application for extension of time

[12] The applicant has conceded in her application to extend time, that her Notice of Appeal was not timely, having been filed some 6 days outside the time frame required by the Rules. As such the Notice was not validly filed. It can only be deemed to be validly filed on the court exercising its discretion to put matters right. This general case management power to extend time is set out in CPR 26.1 (2)(k). Of relevance also is CPR 62.5 which deals with the time frame for filing a Notice of Appeal. It says, in essence, that a Notice of Appeal in cases where no leave is required, or where the appeal is not a procedural one, must be filed at the court office within forty two [42] days of the date when the judgment or order was served on the appellant. No sanction is specified as a consequence of untimely filing. This then brings into play CPR 26.9 which empowers the court to put procedural errors right. The relevant sub-rules of this part for this purpose are 26.9(1) and (3). They state as follows:

> "26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.
>
> (2) ...
>
> (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right."

Clearly then, this brings into play the exercise of a discretionary power by the court. This discretionary power, although a very broad one, cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well established principles. Overall, in the exercise of the discretion the court must seek to give effect to the overriding objective which is to ensure that justice is done as between parties.

The Principles

[13] Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.

[14] I am mindful, that there are a number of decisions by judges of this Court, addressing the various principles to be applied. In fact one of the earliest decisions on the ushering in of CPR 2000 is the case of John Cecil Rose v Anne Marie Uralis Rose,[2] a judgment of Byron CJ (as he then was) sitting also as a single judge in which he dealt with an application for an extension of time to appeal. This case, in my view, captures the essence of the exercise of the discretion with respect to applications of this type, and applications for extensions of time generally, (where no sanction is specified for failure). After referring to CPR 62.16(1)(c) which empowers a single judge to hear such an application, at paragraph 2 of his judgment, he had this to say:

> "Granting the extension of time is a discretionary power of the Court which will be exercised in favour of the applicant for good and substantial reasons. The matters which the court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice if the Application is granted."

The Full Court recently applied these principles in relation to an application for extension of time to appeal in the case of Spectrum Galaxy Fund Ltd. v Xena Investments[3]

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[2] Saint Lucia High Court Civil Appeal No. 19 of 2003 delivered 22nd September 2003.
[3] Territory of the Virgin Islands High Court Civil Appeal No. 13 of 2011, (oral judgment of the court delivered on 27th September 2011).

Delay

[15] As stated above, the Notice of Appeal was filed some 6 days out of time. But perhaps what is more telling is that the application seeking an extension of time took another 48 days to be filed notwithstanding that the respondent had taken the point and brought it to the attention of the applicant on 21st July 2011. It appears that it took the order made on 26th July, 2011, which in essence evinced the Court's intention to strike out the appeal, to propel the applicant into action. But that action itself took another 12 days for the application for an extension to be made. Clearly then, there has been delay, but the more critical question is whether the delay is excusable. This brings me to the next consideration, whether the reasons for the delay are good and substantial.

The reasons for delay

[16] Firstly, in her supporting affidavit the applicant acknowledges that following on the delivery of the judgment on 5th May 2011, she had the option of appealing the judgment 'if seen fit' and that being a final judgment the time for so doing was 42 days.

Secondly, the applicant was very much aware that the respondent was actively pursuing the realization of his judgment, by letter the day after delivery of the judgment and by the taking out of a Judgment Summons on 26th May 2011.

Thirdly, the applicant says that her legal practitioners although they had 'prepared' the Notice of Appeal within the week of 13th to 17th June 2011, had been engaged in a trial that same week and thus was unable to 'finalize' the Notice of Appeal in time for filing.

What is noticeably missing is any explanation as to what transpired between the 6th May and 13th June 2011; a period covering some five weeks when the

applicant was aware of the time frame for taking action. Furthermore, this Court has long since held that pressure of work of a legal practitioner is not a good reason[4]. In light of the circumstances prevailing, I have no hesitation in holding that the applicant has abysmally failed to put forward a good reason explaining the delay and accordingly the delay is inexcusable.

Prospect of success

[17] As a first consideration it must be borne in mind that the applicant seeks to appeal against quantum only [the claim being undefended] in respect of an award of damages on a defamation claim. The principle guiding an appellate court in reviewing an award of damages made by a lower court, was stated in several decisions[5] of this court and recently re-stated in the case of Elwardo Lynch v Ralph Gonsalves[6] thus:

> " …it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one…But we are powered to interfere with the award if we are clearly of the opinion that, having regard to all of the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the lost sustained, or if the damages are out of all proportion in the circumstances of the case The award of damages is a matter for the trial judge's discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere."

[18] The applicant contends that her chances of success on appeal are good and refers to the grounds on which the award is attacked. However on a review of those grounds, as the respondent rightly points out, sub-grounds 1(a) to (e) would be relevant only to liability and seems to simply overlook the fact that judgment was entered in default for failure to file a defence. For example, in ground 1(a) the applicant asserts that the claim was defective. The issue of liability became final and may not be re-opened as the default judgment stands. Ground 1(f) asserts

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[4] See: Casimir v Shillingford and Pinard. (1967) 10 WIR 269.
[5] See: Alphonso v Ramnaut (1997) 56 WIR 183; Vaughn Lewis v Kenny D. Anthony Saint Lucia High Court Civil Appeal No. 2 of 2006, delivered 14th May 2007.
[6] St. Vincent and the Grenadines High Court Civil Appeal No. 2 of 2009, delivered 21st June 2011.

that the respondent was unable to show actual loss suffered. This however overlooks the long established legal principle that damage for libel is presumed. Ground 2 merely asserts that had the Learned Master taken into account the matters complained of in grounds 1(a) to (f) that she would not have awarded the sum of $70,000 which she says is wholly out of proportion and that the award [Ground 4] should be reduced by 50%.

[19] At paragraphs 6 and 7 of the Learned Master's judgment, after setting out the chronology of events leading to the assessment, she referred to no less than seven comparable awards within the region to which she had regard, as was proper for her to do. She also took into account [para. 7] other factors such as the extent of the publication, lack of an acceptable apology and the applicant's conduct to list a few, and thereupon rendered her award. I am unable to discern how complaints going to the issue of liability and the fact that no actual loss [which is wholly unnecessary] would factor into reducing the award. Indeed there is no complaint of an error in principle, or that the Learned Master, took into account irrelevant considerations or failed to take into account relevant considerations; neither has any attempt been made to show that the award made is so out of all proportion in the circumstances that it can only be concluded that the Learned Master in exercising her discretion exceeded the generous ambit within which reasonable disagreement is possible such that it was clearly and blatantly wrong. In my view nothing has been put forward by the applicant which demonstrates realistic prospects of success on appeal. The applicant has not surmounted this hurdle.

[20] Needless to say, if chances on appeal are hopeless then, a fortiori, permitting such an appeal to go forward must be to the certain prejudice of the respondent[7] who has been defamed and then kept out of the fruits of his judgment the rationale of which is to compensate him for an injury done to his reputation and by way of vindication. The respondent obtained judgment almost two years ago, in

[7] See the cases of Norwich v Peterborough [1991] 2 AER 880 and Nicholson Dickson and Muriel Dickson v Barclays Bank , Saint Lucia High Court Civil Appeal No. 3 of 1998 which relied on the Norwich case.

November 2009. The conduct of the applicant in all the circumstances can only be seen as dilatory in engaging all procedures which may commend themselves to her with a view to delaying the just result by the payment of compensation for the defamation of the respondent.

[21] The end result is that the applicant has failed to satisfy the Court on any of the factors herein considered in enabling the exercise of the discretion in her favour. The application for an extension of time is accordingly dismissed. The Notice of Appeal filed on 22nd June 2011 is accordingly invalidly filed.

The Application for a stay

[22] The Notice of Appeal being invalid means there is no pending appeal. It follows that if there is no pending appeal, there can be no stay 'pending appeal' as the proper foundation for a stay pending appeal, is the existence of an appeal, or at the very least, where leave to appeal is required, on the consideration of the grant of leave. Even were an appeal pending, the application for a stay in this case will, inevitably have failed, as the applicant has failed to meet the criteria warranting the grant of a stay in her favour.

Conclusion

[23] The application for an extension of time for filing the Notice of Appeal is dismissed. The Notice filed on 22nd June 2011 is invalid and is accordingly struck out. The application for a stay is also dismissed. The applicant shall bear the costs of the applications fixed in the total sum of $3,000.00.

Janice M. Pereira
Justice of Appeal