EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL SUIT)

BRITISH VIRGIN ISLANDS
BVIHCV 2012/0002

Claimants/Appellants

Ecedero Thomas
Alfred Thomas
Elsair Thomas Malone
Alice Thomas

And

The Chief Registrar of Lands
Daisy Stout
Garfield Stout
Iona Stout Forbes (Executrix of the Will of Essie Stout)
Grethel Stout (Administratix of the Estate of Richard Cardinal Stout)

Defendants/Respondents

On Written submissions:
Willa Tavernier and Rhonda Brown of O'Neal Webster for the Defendants
Tamara Cameron of Farra Kerins for the Claimants

Judgment in Chambers
(2012: May 7, 16 June 21)

1) **Joseph Olivetti J:** Matters touching and concerning land can be counted on to spawn disputes long after courts have ceased to exist, methinks. Here the main issue arises by way of preliminary point in an appeal to the High Court from a decision of the Chief Registrar of Lands. The point taken by the second and third Respondents, Mrs. Daisy Stout and Mr. Garfield Stout is that the Appellants have failed to comply with the requirements of the Civil Procedure Rules (CPR) Part 60.4 in serving the Claim Form and grounds of appeal and that their appeal should be struck out. In response the Appellants filed an application for extension of time .The matter was dealt with on the written submissions filed without any oral arguments**.**

2) **Submissions**

3) Learned Counsel for the Stouts, Mrs. Tavernier and Mrs. Brown submitted in essence that the Stouts were served outside the time limited for so doing and that the court should refuse

the application for an extension of time and dismiss the appeal. They argue that the reason for the delay in service was said to be an administrative error being inadvertence of counsel but that the application for an extension of time was inordinate and was not made promptly after counsel discovered the error and no reason for this further delay was advanced. Counsel argued further that the appeal has no reasonable prospects of success and that in all the circumstances the application should be dismissed. They cited several authorities including **Harold Simon v Henry & Tracy ANU Civil App. Suit 1/1995; Chiverton Construction Ltd. et al v Scrub Island Development Group Ltd. BVIHCV App. 28/2009** ,**C.O. Williams Construction (St. Lucia) ltd. v Inter Island Dredging Co. Ltd. St. Lucia Civil App No. 17/2011 and International Limited v.Barcardi International Civil App. Anguilla 3/2007.**

4) Counsel for the Appellants, Ms. Cameron, had no choice but to concede by filing an application for an extension that the Stouts were served outside the time limited by CPR 60.4 for so doing. However, counsel submitted that the court ought to exercise its discretion under CPR 26.3 and not strike out the appeal having regard to all the circumstances including the prejudice suffered by the parties ,the period of the delay whether the delay has impeded the court's ability to hear the matter and the strength of the claim. Counsel invoked Rules 26.1(2) (K) and 26.9.in support of her application for an extension. Counsel urged that striking out would be a disproportionate measure having regard to the fact that the Appellants complied with section 147 of the RLA and CPR 60 insofar as they issued the claim form and served it on the Chief Registrar within the stipulated time. Counsel urged that the delay in serving the Stouts was not excessive being 15 days late ,that the Stouts were aware of the appeal and had filed a defence. Counsel urged further that the appeal has a real prospect of success and that the Appellants would suffer substantial prejudice if the claim form is struck out as the lands in dispute are of substantial value and they are claiming adverse possession for over 20 years. Two cases were relied on - **C.O. Williams Construction** in which the court held that in determining whether to exercise its discretion under Rule 26.9 the court should not rigidly invoke the criteria set out in Rule 26.8 as this often leads to disproportionate and unjust results (Para.35 per Edwards JA) and **Carleen Pemberton v Mark Brantly ,** approved by the Court of Appeal in **C.O. Williams Construction**(PerreiraJA).

5) **Court's Consideration**

6) I have considered the written submissions in full. The salient facts which are not in dispute are:-

(1).On June 23 2010 the Appellants brought an application before the Chief Registrar for title by prescription to certain lands being parcels 65 and 66 of Block 3437B Long Look Registration Section and Parcels 5,104,105 of Block 3337B Long Look Registration Section;

(2). On 12 December 2011after a site visit and a full hearing at which all parties were represented, the Chief Registrar delivered her decision rejecting the Appellants claim;

(3) On 9 January 2012 the Appellants gave notice to the Chief Registrar of their intention to appeal to the High Court;

(4) On 9 January 2012 the Appellants filed a Fixed Date Claim Form with the grounds of appeal;

(5). On 25 January 2012 the Appellants served the Stouts and Defendant 4 with the Claim Form and the grounds of appeal;

(6) On 31 January 2012 the Appellants served Defendant 5;

(7) On 21 February 2012 the Stouts filed their defence and took issue with service in para. 4 thereof ;

(8) On 7 May 2012 the matter came before the court for directions, the Chief Registrar was then struck off as a party and the court ordered the Appellants to file submissions to address the preliminary point taken by the Stouts in their defence;

(9) On14 May 2012 the Appellants filed an application for an extension of time to effect service on Defendants 2-5;

(10) On May 16 the Appellants and the Defendants filed their submissions.

7) I now turn to the law. Section 147 of the Registered Land Act Cap.229 ("The RLA") provides that the Governor or any person aggrieved by a decision of the Chief Registrar may **within 30 days** of the decision give notice to the Chief Registrar in the prescribed form of his intention to appeal to the High Court against the decision**.** And section 149 stipulates that the Chief Justice may make rules of court for regulating applications and appeals to the court under the provisions of the act.

8) The rules made by the Chief Justice for the prosecution of appeals pursuant to any enactment save appeals by way of case stated are contained in CPR Part 60. Rule 60.2 stipulates that such an appeal must be instituted by Fixed Date Claim Form in Form 2 with grounds of appeal annexed. And Rules 60.4 and 60.5 provide that same must be served on all parties to the proceedings and the clerk of the tribunal or person whose decision is being appealed **within 28 days** of the date on which notice of the decision was given to the claimant.

9) Ms. Cameron noted an apparent discrepancy between section 147 and Rule 60.5. However, in cases of conflict Rule 60.1(3) clearly provides that Part 60 is subject to the relevant legislation. However, I perceive no conflict as section 147 speaks to notice to the Chief Registrar of **an aggrieved person's intention to appeal** it is not the institution of the appeal whereas Rules 60.4 and 60.5 speak to the actual institution of the appeal and the service of appellate proceedings on the party to the proceedings and on the person or tribunal whose decision is in issue.

10) Therefore, in an appeal under the RLA the Fixed Date Claim form with grounds of appeal must be served within 28 days in accordance with Rule 60.5.There can be no doubt that the claim form and grounds of appeal were not served in accordance with Part 60 .5 and that as the Stouts have properly taken issue with service the appeal against them cannot proceed unless the court sees fit to grant the application for an extension of time.

11) Neither the RLA nor Part 60 makes provision for extending the time within which to appeal. However, Part 60 does not exclude the operation of the case management provisions in CPR Part 26 which ordinarily apply to all matters before the High Court It follows then that Rules 26.1(2) (k), Rules 26. 7, 26.8 and 26.9 fall to be considered.

12) Rule 26.1(2) (k) gives the court the power to extend the time for compliance with any rule, practice direction or order of the court. Primarily it is this rule the Appellants pray in aid of their extension application. The Rule itself does not give guidance on the criteria to be applied in the exercise of the discretion given thereby. However Rule 1.2 provides that in the exercise of any discretion granted by the rules or in interpreting any of the rules the court must seek to give effect to the overriding objectives. Further although Rule 60.5 does not expressly stipulate a sanction for non-compliance I agree with counsel for the Stouts that a sanction is implied as if the rule is breached, issue is taken and the court does not grant an extension then the appeal cannot proceed. See Barrow J A paras 4 and 5 in **The Nevis Island Administration v La Copropriete Du Navire J31 et al** , St.Christopher and Nevis Civil App. No. 7/2005 and Rawlins JA in **Pendragon** para.s 11 and 12. Thus the Appellants had to seek relief from sanctions as well as an extension of time. Although they have not formally sought relief from sanctions I will treat such an application as being intrinsically bound up with their extension application. It follows then that Rule 26.9 is not applicable.

13) Rule 26.8(1) provides that an application for relief from any sanction **must be made promptly**; and be supported by evidence on affidavit. In addition Rule 26.8(2) states categorically that 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. The rule provides further in 26.8(3) that the court must have regard to (a) the effect the granting of relief or not will have on each party, (b) the interests of the administration of justice, (c) whether the failure to comply has been or can be remedied in a reasonable time,(d) whether the failure was due to the fault of the party or his/her legal practitioner and (e)whether any trial date can still be met if granted. It is pellucid that the further considerations will not fall to be looked at if the criteria in 26 .8(2) are not met.

14) Now, was the application made promptly? The Appellants did not apply for an extension until 14 May 2012 more than 4 months after the time for service. What is more, their lawyers discovered that they had omitted to serve the Stouts on the 25 January and then they ought properly to have applied for an extension when they sought to effect late service. They did not do so. They were further apprised of this need on 21 February when the Stouts joined issue on service yet they did nothing. It would appear that the need to apply only struck home after the court's order of the May 7 asking for submissions on the preliminary issue as no reason for the failure to make a timely application has been advanced or can be discerned. The making of the application is therefore far from what can be considered as prompt in all the circumstances and amounts to inordinate delay when on considers the time frame given by the rules for service and the RLA for giving notice of intention to appeal. It is obvious that the Legislature intended these matters to proceed with some dispatch.

15) Next, I am satisfied that the failure to serve on time was not intentional and that the Appellants have generally complied with all other relevant rules and orders. However, the remaining question is whether the Appellants have given a good explanation for the failure to serve on time.

16) In the supporting affidavit of Mrs. Small-Davies she explains that the omission to serve the documents on time was due to an administrative oversight in her firm namely that counsel, Mr. Farara Q.C gave instructions to a secretary to serve the documents and did not discover the omission until 25 January when that omission was remedied. However, it is well established that administrative errors on the part of legal practitioners are not good reasons for failure to comply with orders or rules of court.

17) In all the circumstances then, this application was not made promptly and no good explanation has been offered for the failure to comply. Accordingly not having met the criteria in rule 26.8(2) Rule 26.8(3) does not fall to be considered and the extension application must fail. See Rawlins J A in **Pendragon** para 14 **-"The court noted in Richard Frederick that the criteria set out in rule 26.8(2) of CPR 2000 are compendious and accordingly the court may only extend time if all criteria are satisfied. The sub-rule is also stated in imperative terms. It is fatal to an application as the court stated in Dominica Agricultural and Industrial Development Bank if an applicant for an order extending time does not first satisfy rule 26.8(2) of CPR2000. Accordingly the effect of the requirements of this rule falls to be determined even before the requirements of rule 26.8(3) are considered."**

18) **Ex abundantia** I have considered the criteria applicable to cases for leave to appeal **and in particular the prospects of the appeal succeeding.** See C.O. Williams Construction where it was held that the Court must seek to give effect to the overriding objective that justice is done between the parties. The court must therefore consider (a) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted (4) the degree of prejudice if the application is granted and (5) where the case is a complex one the overriding objective in conjunction with the checklist under CPR 26.8 .

19) In the supporting affidavit apart from the statement in para. 7 - "**the Appellants believe** that the appeal has a real prospect of success and that they would suffer substantial prejudice if the claim is struck out", nary a submission was made by counsel for the Appellants on the applicable law. This was telling. In my judgment, having regard to the decision appealed against and the proposed grounds of appeal, counsel for the Stouts are correct in saying that the grounds of appeal are in substance appeals against the finding of facts of the Chief Registrar and that the effort to persuade an appellate court to reverse findings of fact made by a lower tribunal is an uphill one. I see nothing which can persuade me that this appeal has realistic prospects of success if an extension of time is granted. The RLA combined with Rule 60.5 gives an appellant a relatively narrow margin within which to prosecute an appeal. The delay in applying for relief is substantial having regard to that timeline, no good reason was proffered for that delay or for the delay in effecting service and the appeal has no realistic prospects of success. The Appellants have had their day in court and it was incumbent on them to peruse their appeal with every dispatch which they have failed to do.

20) **Decision**

21) Accordingly in all the circumstances the application for an extension of time is without merit with the consequences that the appeal as against the Stouts stands dismissed. Costs of this application to the Stouts to be assessed upon application within 14 days if not agreed.

Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands