

ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 2007

BETWEEN:

[1] PENDRAGON INTERNATIONAL LIMITED
[2] GIGI OSCO-BINGEMANN
[3] VADIM A. FRIDMAN

(the two latter Defendants, as executors of the Estate of Martin Crowley)
Intended Appellants/Applicants

and

BACARDI INTERNATIONAL LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

Appearances by way of written submissions:

Mr. Geoffrey Robertson, QC, Mr. Mark Brantley and Ms. Jean Dyer for the
Intended Appellants/Applicants

Mr. Mark Forte, Mr. Richard Evans and Ms. Tameka Davis for the Respondent

2007: October 9;
November 23.

*Civil Procedure - Injunctive proceedings – Appeal – extension of time for filing appeal –
rule 26.8 of CPR 2000 – check-list to be considered*

The applicants, by Notice of Appeal dated 9th July, 2007, sought to appeal the judgment and order of the High Court continuing interim injunctions issued against the applicants until trial or further order. On 23rd July, 2007 the respondent alleged that the applicants' Notice of Appeal was issued out of time. Although the applicants took the view that the appeal was properly filed, they thought it prudent to make an application for extension of time. The applicants sought an order granting them an extension of time for appealing the judgment and deeming the Notice of Appeal of 9th July, 2007 to be properly filed on the

grounds that any failure to comply was unintentional. They stated that the failure to comply was based on a misapprehension of the law, and that the non-compliance was remedied within a short and reasonable time and that the respondent had not been prejudiced.

Held, dismissing the application and ordering the applicants to pay the respondent's costs in the application to be assessed, if not agreed:

In considering an application for an extension of time, the court must have regard to the check-list in sub-rules 26.8(2) and 26.8(3) of CPR 2000. The requirements of rule 26.8(2) fall to be determined before the requirements of rule 26.8(3) are considered. The court may only extend time if all the criteria set out in rule 26.8(2) are satisfied. The applicants did not provide a good explanation for their failure to file the appeal within the stipulated time. This was fatal to their application. Their failure to address the question whether they complied or not with all other relevant rules, practice directions, orders and directions provided an additional reason for not granting the application. Further, although the application stated that the respondent would not be prejudiced, the applicants' failure to provide any details to support this assertion in the face of statements by the respondent detailing the prejudice which it (the respondent) was likely to suffer, did not assist the applicants' cause to move the court to extend time in the exercise of its discretion.

John Cecil Rose v Anne Maria Uralis Rose St. Lucia Civil Appeal No. 19 of 2003 mentioned

Richard Frederick v Owen Joseph and Others St. Lucia Civil Appeal No. 32 of 2005 and Dominica Agricultural and Industrial Development Bank Dominica Civil Appeal No. 20 of 2005 followed.

JUDGMENT

- [1] RAWLINS, J.A.: On 21st August 2007, the appellants/applicants ("the applicants") applied for an order to extend the time for filing an appeal from the judgment delivered by George-Creque J on 24th May 2007. The application was made pursuant to rule 26.1(2)(k) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR 2000") and/or under the inherent jurisdiction of the court. The applicants prayed that the Notice of Appeal which they filed on 9th July 2007 be deemed properly filed pursuant to rule 26.9 of the CPR 2000.

- [2] Rule 26.1(2)(k) confers discretion on the court to extend the time for compliance with any rule, practice direction, order or direction of the court even where the application is made after the time for compliance has passed. Rule 26.9 applies where the consequences of failure to comply with a rule is not specified by a rule, practice direction or court order.¹ It provides that an error of procedure or failure to comply with a rule does not invalidate any step taken in the proceedings, unless the court so orders.² The rule also confers discretion on a court to rectify an error of procedure or a failure to comply with a rule, on or without an application.³
- [3] Having read the application, as well as the relevant affidavits and the written submissions by solicitors for the parties, this court issued an order dismissing the application on 9th October 2007. This judgment provides the reasons for that decision.

Background

- [4] In the judgment, which the applicants sought to appeal, the learned judge made an order continuing interim injunctions that were issued against the applicants on 30th January 2007 and extended on 12th February 2007 until trial or further order. The judge also held that the requirements of Part 7.5 of the CPR 2000 for permission to serve the claim form and other documents out of the jurisdiction on the 2nd and 3rd applicants had been complied with.
- [5] The application for extension of time was made without prejudice to the position of Pendragon that the court of Anguilla is not the appropriate forum for the determination of Claim No. AXA/HCV 2007/0002. The applicants also made the application without prejudice to the position of the second and third named applicants that they are not amenable to the jurisdiction of the said court and without prejudice to their position that the appeal was duly filed within the time

¹ See rule 26.9(1) of CPR 2000.

² See rule 26.9(2) of CPR 2000.

³ See rules 26.9(3) and (4) of CPR 2000.

prescribed by rule 62.5(c) of the CPR 2000. Rule 62.5(c) requires an appellant to file an appeal, which is not a procedural appeal or an appeal for which leave is required, within 42 days of the date when the judgment appealed against was served on the appellant. It is common ground that this is not a procedural appeal. Injunctive proceedings are expressly excluded from that definition by rule 62.1(2)(e)(ii) of the CPR 2000. It is also common ground that this is not an appeal for which leave to appeal is required. This is because section 29(4)(b) of the Eastern Caribbean Supreme Court (Anguilla) Act⁴ specifically exempts appeals against injunctive proceedings from the leave requirement in respect of interlocutory judgments or orders.

[6] It is noteworthy that while the applicants contended that they filed their appeal within the stipulated time, they indicated that their application for extension of time was only made out of prudence in the event that the court agreed with the contention of the respondents that the appeal was issued out of time.⁵ In that event, the applicants prayed that this court would grant their application on the ground that their failure to comply with rule 62.5(c) of CPR 2000 was not intentional. They insist that it was inadvertent non-compliance, which was remedied within a short and reasonable time by filing the appeal. They stated that they failed to comply with the rule because their solicitors misapprehended when the time for appealing started to run. They further stated that after they studied the judgment they sought legal advice as to the time-frame for issuing the appeal. They concluded therefrom that the 42 clear days limited for appealing expired on the 9th July 2007.

[7] I think that it is necessary to set out, fully, the contents of paragraph 3 to the end of the affidavit in support of the application for extension of time. The affidavit was

⁴ Revised Statutes of Anguilla, Chapter E15.

⁵ The allegation was made at paragraph 23 of the third affidavit of Henry Walter Wiggin filed in Claim No. AXA/HCV/2007/002 on the 23rd of July 2007 and at paragraph 16(2) of the respondent's note on application for permission to Appeal, which was filed on 23rd July 2007.

deposed by Jean M. Dyer. Paragraphs 1 and 2 are excluded because they only contain the usual formalities. The affidavit stated:

“3. On or about the 30th January 2007 the Respondent sought and obtained, without notice to the Applicants, an injunction restraining the Applicants from taking certain actions.

4. On or about the 7th March 2007 the Applicants applied for the discharge of the ex parte Order dated 30th January 2007. A hearing was held on the 20th March 2007 before the Honourable Madam Justice Janice George-Creque and on the 24th May 2007 she delivered a judgment (“the judgment”) refusing to discharge the said Order.

5. The Applicants immediately studied the judgment and, after taking legal advice, decided to appeal the aforementioned judgment. The Applicants’ Solicitors took the view that the time limited for appealing was 42 clear days after the delivery of the judgment and that the time limit expired on the 9th July 2007.

6. The Applicants accordingly filed their Notice of Appeal on 9th July 2007. On the 23rd July 2007 the Respondent at paragraph 23 of the Third Affidavit of Henry Walter Wiggin filed in Claim No. AXA/HCV/2007/002 on 23rd July 2007 and at paragraph 16(2) of the Respondent’s Note on Applicant’s Application for permission to Appeal filed on 23rd July 2007 alleges that the Applicants’ Notice of Appeal was issued out of time. The Applicants’ Counsel took the view that the Notice of Appeal was properly filed within the limited for so doing but thought it prudent to make this application for an extension in the event that this Court is minded to hold that the Notice of Appeal was indeed filed out of time.

7. That if there has indeed been a failure to comply with the time limited for appealing it was not intentional and was due to the Applicants’ Solicitors’ misapprehension of when time for appealing starts running. Furthermore, any such inadvertent non-compliance was remedied within a short and reasonable time and the Respondent has not been prejudiced.

8. That this is a proper case for this Honourable Court to extend the time limit for appealing and to deem the Notice of Appeal filed on 9th July 2007 to be properly filed.

9. In the circumstances, I humbly request that this Honourable Court make an order granting the Applicants an extension of time for appealing the judgment and deeming the Notice of Appeal filed on 9th July 2007 to be properly filed.”

Calculating the time

- [8] The applicants have not shown how they calculated the time for appealing which led them to conclude that their appeal was properly filed on 9th July 2007. Counsel for the respondent submitted that when the “clear days” principle contained in

rules 3.2(2) and (3) of CPR 2000 is applied, the 42 days within which the appeal should have been filed expired on 6th July 2007. They further submitted that by not accepting this even when it was pointed out to them and by failing to explain the method by which they calculated the time, the applicants had acted in a manner that was typical of the way in which they have generally conducted the litigation in the case. Counsel for the respondent contended that this was relevant to the question whether the court should grant the application to extend the time for filing the appeal.

The applicable law

[9] Rule 3.2(2) of CPR 2000 states that all periods of time expressed as a number of days are to be computed as clear days. Rule 3.2(2) of CPR 2000 states that the day on which the period begins and the day on which the period ends are not to be included in computing “clear days”. Since the judgment which the applicants sought to appeal was issued on 24th May 2007, the first day for counting under the “clear days” rule was 25th May 2007. The last day for counting was 5th July 2007. By my calculation, the last day on which the appeal should have been filed in order to comply with rule 62.5(c) was 6th July 2007, excluding the first and the last counting days. The Notice of Appeal was therefore filed out of time on 9th July 2007.

[10] Learned counsel for the respondent submitted, on the authority of *John Cecil Rose v Anne Maria Uralis Rose*⁶ that the grant of an extension of time is a discretionary power. Learned counsel stated that, according to this case, the court will only exercise the discretion in favour of an applicant for good and substantial reasons. They stated, further, that the factors which the court will consider in the exercise of this discretion are, first, the length of the delay; second, the reason for the delay; third, the chances of the appeal succeeding if the extension is granted; and, fourth, the degree of prejudice to the respondent if the application is granted.

⁶ St. Lucia Civil Appeal No. 19 of 2003, at paragraph 2 of the judgment.

- [11] It is noteworthy, however, that in *Richard Frederick v Owen Joseph and Others*,⁷ this court noted that, in *Sayers v Clarke Walker (a firm)*,⁸ the English Court of Appeal stated⁹ 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, failure to comply 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 failure to comply. In *Sayers*, therefore, the court applied and recommended the check-list which CPR r 3.9 of the English Rules provides as the criteria for determining whether the time that is stipulated in the Rules should be extended.
- [12] In CPR 2000 the corresponding rule to the English CPR r 3.9 is rule 26.8. They are in similar, but not identical terms. This court held in *Dominica Agricultural and Industrial Development Bank*¹⁰ that the relevant check-list to be considered under our rules is that which is provided in rule 26.8. The check-list is provided particularly by sub-rules 26.8(2) and 26.8(3) of CPR 2000.
- [13] Rule 26.8(2) states that the court may grant relief (to extend time in the present case) only if it is satisfied that the failure to comply was not intentional; that there is a good explanation for the failure; and the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
- [14] This court noted, in *Richard Frederick*,¹¹ 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 this court stated in *Dominica Agricultural and Industrial Development Bank*, if an applicant for an order extending time does not first

⁷ St. Lucia Civil Appeal No. 32 of 2005 (15th January 2007), at paragraph 9 of the judgment.

⁸ [2002] EWCA Civ 645; [2002] 1 WLR 3095.

⁹ At paragraph 21 of the judgment.

¹⁰ Dominica Civil Appeal No. 20 of 2005 (18 September 2006).

¹¹ At paragraph 9 of the judgment.

satisfy rule 26.8(2) of CPR 2000. Accordingly, the effect of the requirements of this rule falls to be determined even before the requirements of rule 26.8(3) are considered.

The present case

[15] I did not think that the applicants' failure to file the appeal within the stipulated time was intentional. It was my view, however, that the applicants did not provide a good explanation for this failure to comply with rule 62.5(c) of CPR 2000. Their explanation of their misapprehension of law was not convincing. A plea based on that misapprehension of the law is unavailing. Additionally, it is evident from the affidavit of Ms. Dyer that the applicants were apparently oblivious to the need to assist this court to determine whether they have generally complied with all other relevant rules, practice directions, orders and directions. In my view, the applicants' failure to proffer a good explanation for their delay in filing the appeal, was sufficient to defeat their application to extend time. Their failure to address the question whether they complied or not with all other relevant rules, practice directions, orders and directions provided another reason for not granting the application.

[16] Additionally, however, the issue of prejudice is always important when this court is called upon to decide whether to extend time in any matter. This finds expression in rule 26.8(3)(a) of CPR 2000, which requires the court to consider the effect which the granting of relief or not would have on each party. The affidavit in support of the application for extension of time states that "the Respondent has not been prejudiced".¹² The affidavit however contains no statement to support this assertion.

[17] On the other hand, it is noteworthy that in his third affidavit, Mr. Wiggin urged this court to see even the short delay in filing the appeal in the context of the conduct

¹² In paragraph 7.

of the litigation by the applicants. He deposed that, in that context, this was merely another attempt by the applicants to delay the efficient progress of the litigation which has been ongoing between the parties for some time.¹³ He stated that this became a matter of record by way of comment by the learned judge during the course of delivering a judgment in these proceedings on 12th July 2007.¹⁴ Mr. Wiggin chronicled what in his view provided evidence of the applicants' attempts to delay the proceedings to the prejudice of the respondent in the face of the written stock purchase agreement of 3rd September 2004, between the respondent and the applicants.¹⁵

- [18] Mr. Wiggin recalled that the subject matter of the stock purchase agreement is shares in Caribbean Distillers Limited and, under that agreement, the applicants are the sellers of the shares to the respondent. There is related litigation in which the applicants instituted a claim against Mr. John Paul De Joria and The Island Company Limited, which is associated with him. The matter is now on appeal to the Privy Council by Mr. De Joria. The applicants are obliged to close the stock purchase agreement subject to De Joria's appeal. By clause 5.11(c) of the agreement, the applicants undertook to use commercially reasonable efforts to prosecute the De Joria litigation in the Privy Council in order to permit the sale of the shares to the respondent under the agreement. By clause 8(1), the agreement expires on 31st December 2008. At that date, the respondent's rights to the shares under the agreement will terminate. The delay in filing the appeal in the present case mirrors their use of delaying tactics in the litigation of this case as well as in the related De Joria litigation. The latter has languished for over a year without being prosecuted in the Privy Council with no apparent attempts by the applicants to use any effort to have it litigated. This prejudices the rights of the respondent under the agreement.

¹³ In paragraph 3 of the affidavit.

¹⁴ In paragraph 4 of the affidavit.

¹⁵ In paragraphs 5-43 of the affidavit.

- [19] To support the allegation of prejudice, Mr. Wiggin noted that the litigation in the present case arose when the respondent learned that the first named applicant, Pendragon, was seeking to sell the shares in Caribbean Distillers Limited in breach of the respondent's rights under the stock purchase agreement. According to Mr. Wiggin, the respondent's application for injunctive relief was for the purpose of forestalling the imminent sale of those shares to Mr. De Joria, in breach of the respondent's rights under the agreement, at a price that is significantly higher than the applicants are bound to accept from the respondent under the agreement.
- [20] I have not mentioned the foregoing assertions by Mr. Wiggin to comment on their merits. Rather, their mention is intended to show that while the respondent sought to put even the short delay by the applicants in filing the appeal into the context of an alleged course of action by the applicants that could eventually be prejudicial to the respondent's rights under the agreement, the applicants, who in the first place, gave no reasons for stating that the respondent would not be prejudiced, did not even then address the respondent's assertions on the issue of prejudice. This omission did not assist their cause to move this court to extend time in the exercise of its discretion.
- [21] It was in the foregoing premises that I thought that the applicants were not worthy parties in whose favour this court should have exercised its discretion to issue an order extending the time within which to file the appeal. Accordingly, this court dismissed the application by the order of 9th October 2007. In so doing, no direction was given in relation to costs. However, the parties are aware that costs follow the result unless the conduct of the matter by the successful party dictates otherwise. There is nothing in the conduct of the matter by the respondent to prevent the respondent from having its costs. The applicants shall therefore pay the respondent's costs in this application to be assessed, if not agreed.

Hugh A. Rawlins
Justice of Appeal