

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER & NEVIS

SKBHCVAP2022/0006

BETWEEN:

**[1] HERITAGE PLANTATION CONDOMINIUMS LTD.
[2] HERITAGE PLANTATION INC.
[3] MERVIN GRANT**

Appellants

and

DOCHE AND DOCHE INC.

Respondent

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis	Justice of Appeal

Appearances:

Dr. Henry Browne, KC for the Appellants
Mr. Anthony Astaphan, SC with him Mr. Sylvester Anthony and Ms. Renal Edwards
for the Respondent

2022: November 25.

Civil appeal – Application to strike out rectification claim – Notice of appeal filed out of time – Failure to apply for an extension of time – Delayed delivery of the judgment does not automatically extend time for filing – CPR 26.9 – Court’s powers to put procedural irregularities – Appellate court’s exercise of discretion - Res judicata – Whether the learned judge sought to re-litigate the issue of the allocation of the shareholding in the first appellant – Whether the Court should interfere with the trial judge’s exercise of his discretion to grant interim injunctive relief – Continuing breach – Whether the learned judge erred in law in failing to address at all the complaint that the respondent is in continued disobedience of order of the Court

REASONS FOR DECISION

- [1] **PRICE FINDLAY JA:** This was an appeal filed by the appellants against the decision of Ward J given on 11th April 2022. The learned trial judge ordered that the application to strike out the rectification claim was dismissed and granted the injunctive relief applied for by the respondent.
- [2] The appellants by way of the interlocutory appeal sought to challenge the findings of fact and law as found by the learned trial judge.
- [3] For further context, the present parties were also parties to the previously heard and decided consolidated matters of **Mervin Grant et al v Doche & Doche Inc**¹ and **Heritage Plantation Inc v Heritage Plantation Condominiums Ltd et al**² which were before Ventose J. In those claims, Ventose J dealt with, among other claims, an unfair prejudice claim brought by the second appellant for an order that the affairs of the first appellant were being conducted in a manner that was unfairly prejudicial to the second appellant. On 27th January 2020, Ventose J dismissed the unfair prejudice claim.
- [4] Dissatisfied with Ventose J's decision, the appellants appealed to this Court, which appeal was dismissed on 29th April 2021 in respect of the dismissal of the unfair prejudice claim. In that appeal, this Court also set aside orders of Ventose J which he had made regarding the directors and secretary of the first appellant, the allotment and issues of shares in the first appellant, the holding of a general meeting, the preparation of audited financial statements and the allocation of certain proceeds of sale.
- [5] Webster JA [Ag.], who delivered this Court's judgment in that appeal, indicated that Ventose J had no jurisdiction to make those orders under section 144 of the

¹ SKBHCV2017/0343 (delivered 27th January 2020, unreported).

² SKBHCV2018/0186 (delivered 27th January 2020, unreported).

Companies Act³ as the jurisdiction to make those orders under section 144 is triggered by a finding of unfair prejudice. Since Ventose J had dismissed the unfair prejudice claim, he could not have gone on to make those orders and they were accordingly set aside by this Court. This aspect of the background between the parties will become an important feature in the issues as argued by the appellant in the present appeal, for reasons which will become apparent later in the judgment.

Preliminary Point

- [6] Before this Court could commit its mind to the appeal against Ward J's dismissal of the appellants' application to strike out the rectification claim, a preliminary point arose for its prior determination. The preliminary point was taken by the respondent at the hearing that the notice of appeal was filed out of time and was therefore a nullity, no application for an extension of time having been filed by the appellants. The Court heard arguments on the issue and delivered an oral judgment dismissing the notice of appeal as having been filed out of time, with no application for an extension of time having been made. The Court indicated that it would give written reasons for its decision and does as now.
- [7] Specifically, the preliminary objection taken by the respondent was that the notice of appeal and the amended notice of appeal were filed out of time, that is on 6th May 2022, and served on the respondent on 9th May 2022 in breach of rule 62.5(1) of the **Civil Procedure Rules 2000** (the "CPR"). The respondent argued that the notice of appeal and the amended notice of appeal were filed 2 days after the time for so doing had expired.
- [8] CPR 62.5(1)(a) states:
- "62.5(1) The notice of appeal must be filed at the appropriate court office -
(a) in the case of an interlocutory appeal where leave is not required, within
21 days of the date the decision appealed against was made;"

³ Cap.21.03 Revised Laws of Saint Christopher and Nevis, 2002.

- [9] CPR 42.8 states: “A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date.”
- [10] In accordance with the provisions of CPR 62.5(1)(a) and CPR 42.8, where the judgment of the learned judge is dated 11th April 2022, the appellants’ notice of appeal was due to be filed 21 days after that date. In the circumstances of this case, the computation of the due date for filing the notice of appeal necessitates a review of the rules on time computation.
- [11] A relevant provision to the circumstances of this case in respect of time computation is CPR 3.2(5). That rule states: “If the period specified for doing any act at the court office ends on a day on which the court is closed, the act is in time if done before close of business on the next day on which the court is open.”
- [12] It is noteworthy that a computation of 21 days from 11th April 2022 would, under normal circumstances, have resulted in the time for filing the notice of appeal expiring on 2nd May 2023. However, I note that Labour Day in St. Christopher and Nevis was observed on 2nd May 2023. Accordingly, and in keeping with the provisions of CPR 3.2(5), the time for filing the notice of appeal would have expired on expired 3rd May 2022.
- [13] The inescapable conclusion from the above computation is that when the appellants filed their notice of appeal and amended notice of appeal on 6th May 2023, it was in fact filed 3 days out of time.
- [14] The respondent submitted that the Court should not entertain the appeal as a valid appeal until the appellants did what was requested to put it right.
- [15] The appellants in response submitted that they were only made aware of the decision of Ward J on the 20th April 2022, when a copy of the judgment was delivered to the appellants’ attorney’s office.

- [16] The appellants did not apply for an extension of time, nor did the appellants place on the record for the Court any affidavit evidence which the Court could properly consider as to the receipt of the said judgment.
- [17] The delayed delivery of the judgment on the appellants does not automatically extend the time for filing an interlocutory appeal. A proper application to the Court is what is required, with compelling evidence as to the reason for failure to comply with the rules. The Court can only exercise its discretion in those circumstances. The appellants, having been placed on notice that the respondent was taking the point that the notice of appeal was filed out of time, chose not to make an application in writing for an extension of time.
- [18] In **Oliver McDonna v Benjamin Wilson Richardson**,⁴ Barrow JA opined:
- “[25] ...The appellant needed to make a proper application for the extension...That meant making an application in writing, stating grounds for the application, and supporting it by evidence on affidavit.”
- Further he stated:
- “... even if fairness and the proper conduct of the proceedings allowed this court to permit the application to be made in counsel’s submissions (which would be an extraordinary course, in my view) it is for the court to so permit as a matter of the exercise of a judicial discretion. It is not for counsel to decide that this is how the application will be made.”
- [19] The appellants submitted that the respondent had not filed an application to strike out the notice of appeal and therefore the Court ought not to entertain the application.
- [20] The Court was of the view that the appellants were put on notice that the respondent would be taking the preliminary point by the respondent’s notice of opposition, further that the appellants ought to have made the application for an extension of time having been put on further notice that the preliminary point was going to be taken by the respondent at the hearing on 8th November 2022, in that the certificate

⁴ Anguilla Civil Appeal No.3 of 2005 (delivered 29th June 2007, unreported).

of result of that date clearly indicated that the preliminary point was to be heard by this Court on the scheduled hearing date.

[21] A notice of appeal filed outside the time stipulated by the CPR is not validly filed. Such a notice can only be clothed with validity after an application is made to the court and the court exercises its discretion to grant an extension of time, and time is thereby extended, and the notice of appeal is deemed validly filed.

[22] While there is no sanction attached in CPR 62.5 for the failure to file within the stated time frame, the court has powers under CPR 26.9 to put procedural irregularities right.

[23] The relevant provisions of CPR 26.9 state:

“26.9(1) This rule applies only where the consequences 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.

...

(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.”

[24] This gives the court the discretion to act, however this discretion is not to be exercised in an arbitrary or whimsical fashion. There are set principles which the court must apply in deciding whether there is reason to exercise that discretion in favour of the party who has failed to comply. The court must also bear in mind the overriding objective in deciding whether to exercise that discretion.

[25] In **Carleen Pemberton v Mark Brantley**,⁵ Pereira JA stated:

“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 be considered in the exercise. Another very important factor, for example, where the application,

⁵ SKBHC VAP2011/009 (delivered 14th October 2011, unreported).

as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.”

This case related to an application for extension of time, and even if in that case an oral application for such an extension of time was made, that application would not have been granted utilising the principles expounded therein.

[26] Further Byron CJ in **John Cecile Rose v Anne Marie Uralis Rose**⁶ stated:

“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 the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted.”

Delay

[27] The notice of appeal in this matter was filed 3 days out of time. The appellants failed to file any affidavits setting out the reasons for the delay, but counsel sought to give reasons orally at the hearing as to why the notice of appeal was filed out of time. This approach of leading evidence from the bar has long been frowned upon by the courts. In the absence of any filed affidavits setting out the reasons for the delay the Court in effect had no reasons advanced on the appellants’ behalf as to why there was a delay in filing the notice of appeal.

[28] In this matter, even up to the date of the hearing no application for an extension of time was filed even though the respondent indicated that it intended to take the point in its notice of opposition and the certificate of result of this Court dated 8th November 2022 indicated that the preliminary point would be argued at the hearing of the substantive appeal. There was not only delay, but there was also a complete lack of action by the appellants. Was this delay excusable? What were the reasons advanced for the delay?

⁶ Saint Lucia Civil Appeal No. 19 of 2003 (delivered 22nd September 2003, unreported).

[29] In those circumstances, the Court is constrained to find that the appellants have failed to put forward any good reason to explain the delay and accordingly the delay is inexcusable.

Prospect of Success

[30] The appellants contend that the chances of success on appeal are good and refers to the several grounds of appeal filed on behalf of the appellants.

[31] The appellants filed seven (7) grounds of appeal which may be summarised into the following issues:

- (i) whether the learned judge erred when he failed to find that the issues raised in the rectification claim brought by the respondent were *res judicata*;
- (ii) whether the learned judge was plainly wrong to extend the interim reliefs imposed on the appellants; and
- (iii) whether the learned judge was plainly wrong when he found that there was no continuous breach by the respondent of paragraph 70 of the judgment of the Court of Appeal dated 29th April 2021 which provided that proper financial accounts were to be produced and delivered to the second appellant, a shareholder of the first appellant, without delay.

[32] Grounds 1, 2 and 3 of the amended notice of appeal challenge findings of fact as well as mixed findings of fact and law made by the trial judge. Where an appeal seeks to challenge findings of fact and law it is incumbent on the appellant to show that the trial judge was plainly wrong. An appellant has to convince the appellate court that the trial judge went outside the generous ambit of his discretion and that the findings are such that no reasonable tribunal could have come to the conclusions which the trial judge did.

[33] The principles applicable to appellate intervention with respect to findings of fact and inferences to be drawn from facts made by a trial judge are well settled.

[34] In **McGraddie v McGraddie and another**,⁷ the correct approach was summarised as follows:

“It was a long settled principle, stated and restated in domestic and under common law jurisprudence, that an appellate court should not interfere with the trial judge’s conclusions on primary facts unless satisfied that he was plainly wrong...”

[35] Baptiste JA in **Margaret Blackburn v James A.L Bristol**⁸ cited Lord Hodge in the Privy Council case of **Beacon Insurance Company Limited v Maharaj Bookstore Ltd**⁹ where he stated:

“Lord Hodge went on to say that it has often been said that the appeal court must be satisfied that the judge at first instance has gone ‘plainly wrong’. His Lordship explained that this phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts. Rather it directs the appeal court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. The appeal court is required to make this judgment in the knowledge that it only has a printed record of the evidence. Lord Hodge gave guidance as to how this task was to be approached. He said: ‘The court is required to identify a mistake in the judge’s evaluation of the evidence that is sufficiently material to undermine his conclusions’. His Lordship stated that occasions meriting appellate intervention would include a failure of a trial judge to properly analyse the entirety of the evidence.”

[36] The learned trial judge took into account all the relevant evidence which he ought to have in coming to the various findings of fact, and it cannot be said that he was plainly wrong in so doing.

Strike Out Application- Res Judicata – Abuse of process

[37] The appellants submitted that the issues raised in the claim at bar were previously heard and decided in the consolidated matters of **Mervin Grant et al v Doche &**

⁷ 2013 1 WLR 2477.

⁸ GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) at para [15].

⁹ 2014 4 All ER 418.

Doche Inc and Heritage Plantation Inc v Heritage Plantation Condominiums Ltd et al (unfair prejudice claim) which were before Ventose J. The appellants applied to have the claim struck out on the basis of *res judicata*.

[38] The appellants argue that under the principle of *res judicata*, matters litigated before the High Court may not be re-litigated before it a second or subsequent time by the same parties on the same subject matter in controversy. They specifically argued that despite Ventose J granting a declaration that the respondent owns or is entitled to 90% of the shareholding in the first appellant and agreed that the respondent should be registered as 90% owners of the shares, the Court of Appeal's order dated 29th April 2021 had set aside that order by Ventose J. They submit therefore that the matter of the allocation of shareholding in the first appellant cannot be re-litigated as it has already been finally decided by this Court in the order dated 29th April 2021, making the amended claim for rectification an abuse of process.

[39] At paragraphs 12-31 of his judgment below, after setting out the chronology of events including an exhaustive analysis of the concept of *res judicata* and applying the principles of *res judicata* to the facts of this case, the learned judge came to the conclusion that the doctrine did not apply to the facts of this case. Indeed, I agree with the respondent's submission that the learned judge did not seek to re-litigate the issue of the allocation of the shareholding in the first appellant, but simply sought to interpret the judgments of Ventose J and the Court of Appeal. A review of the previous decisions of Ventose J and the Court of Appeal was not only reasonable in the circumstances but was critical in deciding the issue of *res judicata*.

[40] The trial judge accurately found that both Ventose J and Webster JA [Ag.] had in fact decided that the respondent was, as a matter of law, entitled to 90% of the first appellant's shares. This review in no way re-litigated the issues already decided between the parties nor attempted to overturn the decisions made by the previous tribunals. The trial judge was interpreting the decisions, not overruling them or deciding them afresh.

[41] The trial judge's review of both Ventose J and Webster JA's judgments brought cognizance to the fact that the context of Webster JA's order to set aside the order of Ventose J relating to the allocation of shares in the first appellant was specifically linked to Ventose J's lack of jurisdiction to make such orders and not an acceptance that the second appellant was entitled to all the shares in the first appellant. At paragraph 22 of his judgment Ward J states: "It is clear from a review of the Court of Appeal's judgment that it set aside the orders because it held that the learned judge had no jurisdiction to make them."

[42] At paragraph 29 of his judgment Ward J makes clear that his review of Ventose J and Webster JA's judgments is an interpretation exercise and not a reversing of any finding. He states:

"This is not a question of reviewing or reversing any finding of the Court of Appeal (which I clearly cannot do) but merely of interpreting the statement of the Court of Appeal in light of the material before me."

[43] Ward J's decision simply gives effect to the findings of fact in Ventose J and Webster JA's judgments on the allocation of shares in the first appellant company. He correctly found that rectification to reflect 90% ownership in the first appellant to the respondent, and the remaining 10% to the second appellant, was required. Accordingly, the trial judge did not err in dismissing the application to strike out the claim.

Extension of interim reliefs

[44] In respect of the trial judge's grant of interim reliefs imposed on the appellants, the extent of the appellants' argument was stated as follows in their written submissions:

"The Respondent/Claimant Doche & Doche Inc. was:

- i) Obligated to give full and frank disclosures to this Honourable Court.
- ii) Indicate the weaknesses in its case.
- iii) Draw to the Court's attention any possible defences by the Respondent/Defendant.

- iv) Inform this Honourable Court that the Court of Appeal had struck down or set aside the Orders of Ventose J to issue the shares as the Respondent/Claimant had contended for.
- v) The Respondent/Claimant failed to pay regard to any of the [(iii) – (iv)]
- vi) The fact that the Court of Appeal went out of its way to observe that Ventose J could not make the Orders Doche & Doche Inc. had sought and for those very Orders to be reimposed by the Order of 21st May 2021 is wrong.
- vi) That the allocation and issue of shares in a Private Company cannot be done lawfully by a Court in the circumstances of this case. The allocation and/or issue of shares in HPC are governed by the Companies Act or alternatively by the relevant appropriate Articles of Association of HPC.
- viii) The allocation and issue of shares in HPC was very much a live issue before Ventose J and thereafter by the Court of Appeal.”

[45] Having perused the trial judge’s judgment I note that he took cognizance of the relevant principles related to the grant of interlocutory injunctive relief through the pronouncements in the cases of **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA**¹⁰ and **The American Cyanamid Co v Ethicon Ltd**.¹¹ He further considered that there was a serious issue to be tried relating to the respondent’s entitlement to and the procedural mechanism by which the respondent may effect the rectification of the first appellant’s Register of Members to obtain legal title. The trial judge also concluded that damages were not adequate in the circumstances and that preserving the current status quo was the best course to cause the least irremediable harm, would be just and convenient and would protect the rights of both parties as determined by the courts. Ultimately, the trial judge determined that it was just and convenient to grant the interim relief sought by the respondent.

¹⁰ [1979] AC 210.

¹¹ [1975] 1 All ER 504.

[46] The appellants have failed to convince this Court that the trial judge took into account any irrelevant considerations or failed to take into account relevant considerations. It has not been demonstrated that the trial judge in exercising his discretion had exceeded the generous ambit within which reasonable disagreement is possible such that his decisions were clearly and blatantly wrong. They have not shown any error in principle committed by the trial judge in the exercise of his discretion to extend the interim reliefs, such that warrants appellate intervention. I consider as well that appellate courts ought not to reverse the order of a trial judge merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. These are the relevant principles for consideration when an appellate court considers whether to interfere with the exercise of a trial judge's discretion and I adopt them accordingly.¹² In circumstances where I have found no clear error on the part of the judge in the exercise of his discretion, there is no basis for this Court to interfere with the trial judge's exercise of his discretion to grant interim injunctive relief.

Continuing breach by the respondent

[47] The appellants also contend that the learned judge erred in law in failing to address at all or adequately address the complaint in the appellants' application to strike out the respondent's amended claim herein, that the respondent is in continued disobedience of paragraph 70 of the order of the Court of Appeal in Civil Appeal SKBHCVP2020/0006 dated 29th April 2021 that financial accounts should be produced and delivered to Heritage Plantation Inc, a shareholder of Heritage Plantation Condominiums Ltd.

[48] Having perused Ward J's judgment, I note that he took cognizance of the appellants' complaint of the alleged continuing breach, however, he does not seem to address the said complaint to a point of resolution. Despite this, I am of the view that there is no merit to the appellants' complaint on this issue. Paragraph 70 of Webster JA's judgment is not an order of the court but rather a comment. The paragraph reads:

¹² Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188.

“I commented in this judgment, as did the trial judge in his judgment, that there is a need for proper financial accounts to be produced... These accounts should be produced and delivered to HPI, a shareholder of HPC, without further delay.”

[49] Moreover, there was no mention of a direction for the financial accounts to be produced in the final orders of Webster JA’s judgment. Therefore, the respondent could not be in breach or contempt for failing to do something it was not formally ordered to do but simply urged to do as a matter of course. Accordingly, this ground of appeal fails.

[50] In reviewing the grounds of appeal, I find that nothing has been put forward to the Court by the appellants which demonstrates a realistic prospect of success on appeal.

Conclusion

[51] In conclusion, the appellants have failed to satisfy this Court with respect to any of the relevant factors that would allow this Court to exercise its discretion in their favour.

[52] Accordingly, this Court orders as follows:

- (i) The oral application for an extension of time is hereby dismissed.
- (ii) The amended notice of appeal filed on 6th May 2022 is accordingly struck out, having been filed out of time.

- (iii) Costs are awarded to the respondent in a sum no more than 2/3 of the sum assessed in the court below.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Vicki-Ann Ellis

Justice of Appeal

By the Court

Chief Registrar