In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: No 459

IN THE MATTER OF THE CLEAN AIR ACT

AND

IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT

AND

IN THE MATTER OF AN APPLICATION TO OPERATE A PAINT BOOTH

BETWEEN:

CARDOZA'S GARAGE LIMITED

Appellant

-v-

THE MINISTER OF HEALTH SENIORS AND THE ENVIRONMENT

Respondent

REASONS FOR DECISION

(in Chambers)

Clean Air Act 1991-rules governing service of documents- Appeal to Supreme Court-time for appealing-application for extension of time-governing principles-Rules of the supreme Court 1985 Order 3 rule 5 and Order 55

Date of Decision: February 10, 2016
Date of Reasons: May 2, 2016

Mr Cameron Hill, Sedgwick Chudleigh Ltd, for the Appellant
Ms Shakira Dill-Francois, Deputy Solicitor-General, for the Respondent

Background

1. By an artfully drafted Notice of Motion filed and issued on November 13, 2015, the Appellant appealed against the Respondent's decision "*dated 20th October 2015, received by the Applicant on Monday 26th October 2015*" on various grounds ("the Decision"). The appeal was on its face filed 18 days after it was "*received*" and 24 days after the Decision was made.

2. Paragraph 4 of the Third Schedule to the Clean Air Act 1991 provides as follows :

> "***Appeals***
> *4.(1) A licensee may appeal to the Supreme Court against the cancellation of his licence under sub-paragraph (b) of paragraph 1 or against the suspension or variation of his licence under sub-paragraph (b) of paragraph 2.*
>
> *(2) The bringing of such an appeal suspends the cancellation, suspension or variation appealed against pending the determination or abandonment of the appeal.*
>
> *(3) An appeal under this paragraph must be brought within twenty-one days of the date on which the instrument cancelling, suspending or varying the licence, as the case may be, was served on the licensee.*
>
> *(4) On an appeal under this paragraph, the Supreme Court may confirm, vary or reverse the decision of the Minister and exercise any power that the Minister could have exercised under this Act in the matter under appeal."*

3. The Respondent sought to torpedo the appeal before full hostilities were joined by issuing a Summons dated November 24, 2016 effectively seeking to strike out the appeal on the grounds that was filed late. This Summons was accompanied by an Affidavit of Service sworn by the well-known process server Ms Evernell Davis, who deposed that she served the Decision on October 20, 2015 at the offices of Sedgwick Chudleigh Ltd and that "*Mr Chen Foley accepted service on behalf of Sedgwick Chudleigh*". This application was opposed on the grounds that service was not validly effected on this date. In the alternative, a short extension of time (3 days) was sought.

4. At the end of the hearing of that application on February 10, 2016, I ruled that, for reasons which I would deliver later, that service was properly effected and the Notice

of Motion was filed out of time. I granted an extension of time on the basis that the interests of justice, broadly defined, require the Court to give deference to the Appellant's right to be heard. I further reserved costs.

5. I now give reasons for this decision.

Was service on Sedgwick Chudleigh on October 20, 2015 effective?

6. It was not disputed that the Decision, addressed to the Appellant's attorney Mr Chen Foley, was served at the offices of Sedgwick Chudleigh on October 20, 2015. Indeed, the Appellant's principal Mr Mark Sousa deposed that he was served on the same date. However he contended that the Appellant as a corporate body ought to have been served at its registered office.

7. Jennifer Attride-Stirling, Permanent Secretary, deposed that extensive correspondence had taken place on the environmental matters which formed the subject of the Decision with Sedgwick Chudleigh and that it was against that background that the Decision had been addressed to and served upon the Appellant's attorneys. A colleague (who confirmed this in her own Affidavit) received a call from Mr Hill of the same firm on October 20, 2015 in terms which signified that he had received the letter as well. The Decision (to vary an Operating License under section 24 of the Clean Air Act 1991 ("the Act"), opens with the following introductory paragraphs:

> "*I write further to my letters of the 7th July 2015 and 13th August 2015, in relation to the captioned matter.*
>
> *I have not received any representations from you on behalf of your client, despite affording you additional time to respond and provide same.*"

8. Those earlier letters were sent by the Respondent to the Appellant's attorneys, who responded in each case requesting further time to communicate a substantive response. The Decision was simply the final link in a chain of correspondence between the Respondent and the Appellant's attorneys the effect of which was that the Appellant's attorneys represented unambiguously that they were authorised to receive correspondence in relation to the same subject-matter on behalf of their client. Ms Dill-Francois relied upon the Barbados Court of Appeal decision of *Mason-v-Roberts; Roberts-v-Trotman* (1999) 59 WIR 41 to invite the Court to make this finding. In this case, a landlord acting through attorneys served notices to quit; the tenants responded by serving notices of intention to purchase on the landlord's attorneys. Sir Denys Williams CJ, delivering the judgment of the Court, opined as follows (at page 46):

> "*We see no material difference between a situation where a party responds to a letter from another party's attorney at law and a situation like the present where the response is to a notice to quit. We cannot but think that an attorney at law who has authority to dispatch a communication has like*

authority to receive the reply thereto, provided that the reply is in answer to the communication and there is no such delay in making the reply as would give rise to a reasonable doubt whether the authority fo the attorney is still subsisting."

9. More pertinently still, the Act has its own special service provisions which are expressed in the following terms, and which may be viewed as giving statutory effect to the common law apparent authority rules affirmed in the *Mason* case:

> "***Service of documents***
> *27 (1) A document to be served under this Act by one person ("the server") on another person ("the subject") is to be treated as properly served on the subject if dealt with as provided for in this section.*
>
> *(2)The document may be delivered or sent by post to the subject, or addressed to him by name and left at his proper address.*
>
> *(3)For the purposes of subsection (2), a document sent by post to, or left at, the address last known to the server as a person's address shall be treated as sent by post to, or left at, his proper address.*
>
> *(4)References in this section to the serving of a document on a person include the giving of the document to him.*" [Emphasis added]

10. In these circumstances, Mr Hill's submissions about the general requirement for service on a company's registered office (which presupposes that an alternative mode of service has not been agreed) or the irregularity of service of Court documents otherwise than at a company's registered office (which is also capable of being waived, even if Court documents were involved) were entirely beside the point. The evidence clearly showed that the Appellant's attorneys were served with the Decision as part of a chain of correspondence they had entered into with the Minister on the Appellant's behalf.

Was late filing of the Notice of Motion fatal or should an extension of time be granted?

11. The statutory provision creating the right of appeal does not itself confer upon this Court the discretion to extend the time for appealing. In line with this drafting approach, the Court of Appeal Act creates the substantive right of appeal and leaves the power to deal with extensions of time to be dealt with by the Rules. Section 13G of the Bermuda Immigration and Protection Act 1956 creates a right of appeal to the Supreme Court within 21 days of an Immigration Appeal Tribunal decision. This leaves Order 55 of the Rules of the Supreme Court to regulate the disposal of appeals

on a standard basis for all appeals from statutory bodies and public officials insofar as the procedural issues in question are not matters which are regulated by any other enactment. Under Order 55 rule 4, the standard time for appealing is 28 days, seven days' longer than the statutory time limit applicable in the present case. However, the Court would be empowered to extend time on the same basis as for any other matter time limit prescribed by the Rules under Order 3 rule 5. The exercise a power to extend time under the Rules would have to be informed by the overriding objective in Order1A.

12. It is these rules which it was common ground govern the Appellant's application for an extension of time. Order 33 rule 5(3) empowers the Court to extend or abridge the time "*to do any act in any proceedings*". Order 55 rule 3 provides that an appeal to which Order 55 applies "*must be brought by originating motion.*" It was the time for bringing the originating motion (i.e. for filing the appeal), which the Court was asked to extend.

13. The fact that paragraph 4 of the Third Schedule to the Clean Air Act does not itself confer any power to extend time does not by itself, therefore, signify that a more restrictive approach should be taken by this Court when its general jurisdiction under Order 3 rule 5 is invoked. However, the Deputy-Solicitor General was correct to contend that the statutory context of environmental protection was one in which, for obvious reasons, public policy would ordinarily favour a prompt implementation of regulatory decisions. Bearing in mind that the Appellant appeared, in the lead up to the Decision, to have been guilty of delay (whether by accident or design), it is entirely understandable that the Minister sought to stop a late appeal, which from her perspective might well have seemed to be yet another delaying tactic, in its tracks.

14. What legal support was there for the notion that an appeal which was filed three days late and was seeking to challenge the legality of a decision which was said to threaten the viability of an established business should be struck out and an extension of time application refused? Ms Dill-Francois was unable to place any supportive local or any modern persuasive precedents before the Court. She relied upon statements from four English cases decided in the 1990's in the pre-CPR and pre-Human Rights Act 1998 (UK) era. However, they dealt with the English Order 3 rule 5 and were, accordingly, all potentially highly persuasive:

    (a) *Smith-v-Secretary of State for the Environment* (1987) Times, 6 July was Court of Appeal decision declining to allow an appeal against the first instance judge's refusal to grant an extension of time on facts which are somewhat unclear. However the report does state that the appeal to the Court was a second rather than a first appeal against an enforcement notice. May LJ stated that "*Order 3, rule 5 did not provide an easy escape route for those who did not conduct their client's cases with reasonable expedition*";

    (b) [1] *Yns Mon Borough Council-v-Secretary of State for Wales and others* [1992] 3 PLR 1 was a case where the Secretary of State on appeal quashed enforcement notices served by the council which, due to a

mistake as to the appeal period by its solicitors, filed an appeal to the court one day late. Rose J refused the application to extend time but in light of unusual facts. He stated (at pages 3-4):

> "*…in the ordinary way the application would have succeeded…There is no doubt…that there are very special circumstances in the case which would give rise to prejudice of a substantial kind if I were to extend the period, as I am asked to do…*";

(c) In *Regalbourne Ltd-v-East Lindsey District Council* (1993) The Times, 16 March, the Court of Appeal refused to set aside the first instance judge's refusal of an extension of time application made in relation to an appeal from a statutory (tax) tribunal. It is unclear how long the delay was, but Kennedy LJ stated (transcript, page 2):

> "*In any event, in the interests of good administration, public law challenges to decisions of tribunals were to be made within a limited time-scale the courts would always be reluctant to extend time in such a situation.*";

(d) *Phillips-v-Derbyshire County Council*, Divisional Court, October 9, 1996 (unreported) was a case where an extension of time of 4 days was sought to pursue a second appeal against the appellate decision of a statutory tribunal. Sedley J (as he then was) refused the application. It is noteworthy that:

(i) the Tribunal's decision letter concluded with following words:

> "*If you consider that the Tribunal's decision is wrong on a point of law, you may appeal to the High Court. <u>There is a strict time limit for appealing</u>…*" [Emphasis added];

(ii) Sedley J (transcript page 4) noted:

> "*It is however, apparently contemplated by Balcombe LJ that in practice forgetfulness may be accepted by the Court as an excuse for minimal delay. I would certainly not want to close that door, but it is a small one…*"

15. In this case, although the Appellant's principal in his evidence (seeking to explain his lawyers' delay in filing) blamed confusion on whether the Decision had been properly served on the delay, the true reason appears to me to be aptly characterised as "*forgetfulness*" in circumstances where, as Mr Hill confessed from the Bar, counsel with carriage of the appeal was incapacitated for a period of time due to an accident. This was a "small door" through the Appellant ought, in my judgment, be permitted to slip through.

16. There are important distinctions to be made between the present appeal and the appeals in each case relied upon by the Deputy Solicitor-General, where a strict approach was adopted and extensions were refused. In the three cases where the citizen was refused an extension of time, the citizen had already had a first level appeal against the original decision made by the Executive. Even in the fourth case where the council's application for a 1 day extension was refused, this was on the grounds that many citizens affected (and who had benefitted from the tribunal decision sought to be appealed) would be prejudiced if a longstanding matter was further protracted. In the present case, the Appellant is seeking to pursue an initial challenge before an independent tribunal and will potentially suffer real prejudice if not allowed to pursue the appeal. Mark Sousa deposed:

> "*22. In short, if I am required to operate under the conditions imposed then the business would have to close. It would not be economically viable. I am defending the jobs of my employees and my own livelihood.*"

17. In these circumstances, not having any sufficient basis at this stage to reject those assertions of prejudice, I found that the constitutional right of access to the Court embodied in the following provisions of section 6 of the Bermuda Constitution trumped all other considerations and justified granting the short extension of time sought:

> "*(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*"

18. In my judgment the guiding principles informing the exercise of this Court's jurisdiction to extend the time for appealing under paragraph 4 of the third Schedule to the Act (and similar statutory appeal provisions conferring on this Court a power to extend the time for appealing) must be that:

> (1) the Court should uphold the time fixed for appealing by the Act and should only extend time where good cause is shown for doing so;
>
> (2) what constitutes good cause for an extension will depend on the facts of the relevant case, including the length of delay the appellant is guilty of and countervailing public policy dictates operating in favour of achieving finality in the matter concerned;

(3) all of the above considerations are subject to the overriding constitutional requirement that civil litigants be afforded access to the Court and/or an independent tribunal under section 6(8) of the Constitution.

Conclusion

19. For the above reasons on February 10, 2016, I found that the Respondent had succeeded in establishing that the Decision was duly served so that an extension of time within which to appeal of 3 days was required. I also found that the Appellant should be granted the extension it sought by way of alternative to its contention that its Notice of Motion was timely filed.

20. The parties expressly requested that I set out my provisional views as to costs in the present Judgement, which was why costs were reserved. Unless either party applies by letter to the Registrar within 14 days to be heard as to costs, I would make no Order.

Dated this 2nd day of May 2016 _____

IAN RC KAWALEY CJ