In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CIVIL APPEAL NO: 5

BRUCE HOLLIS

Appellant

-v-

PETER FRITH & CHRISSY FRITH

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: January 15, 2014
Date of Judgment: January 21, 2015

Mr. Eugene Johnston, J2 Chambers, for the Appellant
Mr. Christopher Swan, Christopher Swan & Co, for the Respondent

Introductory

1. When is an appeal not an appeal? According to the Appellant, in answer to the Respondent's application to dismiss the appeal for failure to file a Notice of Appeal within 14 days after receipt of the Record, an appeal from the Magistrates' Court is only an appeal for the purposes of the Civil Appeal Act 1971once a Notice of Appeal has been filed. It matters not that the history of the matter is as follows:

    (a) the Respondents obtained a judgment in their favour for the net amount of $5,519.97 in the Magistrates' Court (Wor. Juan Wolffe) on September 24, 2012;

[1] The Judgment was circulated without a formal hearing for handing down.

(b) the Appellant on March 22, 2013 obtained leave from the Magistrates' Court to file a Notice of Intention to Appeal out of time;

(c) the Appellant filed a Notice of Intention to Appeal on March 25, 2013;

(d) the Appellant obtained a stay of execution of the Judgment from the Magistrates' Court in reliance upon the filing of the Notice of Intention to Appeal;

(e) the 'record' was signed by the Learned Magistrate as of January 29, 2014 and collected by the Appellant from the Magistrates' or the Supreme Court on February 13, 2014;

(f) although on February 27, 2014 the Appellant's counsel complained by letter to the Magistrates' Court that the omission of the notes of evidence meant the record prepared was defective, a typed copy of the 11 page Judgment was supplied;

(g) by letter dated January 31, 2014, the Registrar of the Supreme Court requested the Appellant's attorneys to file a Notice of Appeal so that the appeal could be fixed for hearing without response;

(h) on April 21, 2014, the Respondent's counsel wrote the Registrar enquiring whether the appeal had been set down for hearing;

(i) by letter dated April 24, 2014, by which time the Appellant's counsel had been supplied handwritten copies of the Magistrates' notes, the Registrar asked the Appellant's attorneys to confirm whether they wished to pursue the appeal and reiterated the request for a Notice of Appeal to be filed so that the appeal could be listed for hearing. Again there was no response;

(j) under cover of a letter dated May 28, 2014, the Respondents issued their Summons seeking a dismissal of the appeal pursuant to sections 12 and 13 of the Civil Appeal Act 1971;

(k) on June 19, 2014, the Court directed the Magistrates' Court to issue a typed version of the Magistrates' notes and adjourned the Respondents' Summons generally with liberty to restore, reserving costs;

(l) on or about November 28, 2014, the typed transcript of the notes of evidence running to 46 pages were filed in the Supreme Court;

(m) by Notice dated December 8, 2014, the appeal was listed for hearing on January 15, 2015 in open Court;

(n) at the substantive hearing of the appeal the Appellant's counsel:

(i) informed the Court that he had lost contact with his client and was accordingly unable to file a Notice of Appeal; and

(ii) in the context of resisting the Respondents' application for the appeal to be dismissed for the first time, some 20 months after obtaining a stay of execution pending the determination of the appeal, argued that no valid appeal capable of being dismissed was before the Court on a proper construction of the Act;

(iii) invited this Court to preserve the Appellant's right to apply to the Magistrates' Court for an extension of time for filing a Notice of Appeal, if so advised, on the basis that it was now conceded that no stay of execution ought to have been sought or granted on the strength of the Notice of Intention to Appeal alone.

2. Mr. Swan essentially pressed the Court to deliver common sense 'real world' justice and to avoid being beguiled by Mr. Johnston's sophistry and producing an outrageous result. Mr. Johnston insisted that he was entitled in any event to rely on the strict letter of law.

3. When the history of the present proceedings is looked at in detail, it is obvious that the appellate procedure of the Court has been used by the Appellant to deny the Respondents the fruits of the Judgment they obtained over 2 years ago in the Magistrates' Court, in circumstances where the Appellant (despite access to a lengthy typed judgment for more than 11 months) has yet to articulate even orally a single ground of appeal. These facts cried out for a summary finding that the proceedings should be struck out on abuse of process grounds.

4. However, Mr. Johnston's beguilingly intricate argument made it impossible for the Court to readily assess in precisely what way the Court's processes had been misused, in circumstances where doubt was persuasively cast on how those processes are intended to operate.

Legal findings: the statutory scheme under the Criminal Appeal Act 1971

Relevant provisions

5. The appeal procedure as prescribed by the Act may be summarised as follows:

(a) an appeal lies as of right against a final order of the Magistrates' Court (section 3);

(b) the first step to be taken by an appellant wishing to challenge a final order is to file a notice of intention to appeal in the Magistrates' Court within 30 days of the final order. This does not automatically operate as a stay but the magistrate has the discretion to grant a stay. The "appellant" must pay a fee for the preparation of the record (section 4);

(c) "*an appeal shall not lie*" unless a notice of appeal is filed and served within 14 days of receipt of the record (section 6(1)) although for good cause the magistrate may extend time for so doing (section 7);

(d) where all of the appeal conditions have been complied with, judgment is automatically stayed pending determination or abandonment of the appeal (section 8);

(e) within 7 days of the notice of appeal being served, the magistrate shall "*transmit under his hand to the Registrar the complaint, the summons, the pleadings, if any, and the record of proceedings in the case, the notes of evidence taken on the hearing thereon and the documents, if any, produced in evidence, and the judgment appealed against" (section 10(1));*

(f) this Court is empowered "*if the notes of evidence are not produced, to hear and determine the appeal upon any other evidence or statement of what occurred before the court of summary jurisdiction which the Court may deem sufficient*" (section 10(2));

(g) the appellant must apply to the Registrar for the hearing to be set down within 10 days after filing the notice of appeal, or such further time as the Court may allow (section 12);

(h) section 13(1) provides:

> "*Where the appellant has failed to comply with the duty imposed upon him under section 12, the respondent may apply to the Court or a judge by summons for the appeal to be dismissed, or, if the*

appellant has been notified in writing by the Registrar that he has failed in such duty, the appellant shall be deemed to have abandoned the appeal five days after the date specified in such notification."

Was there an 'appeal' before the Supreme Court?

6. I reject the submission that there is no 'appeal' in existence before a notice of appeal is filed. The appeal process clearly commences with the filing a notice of intention to appeal and a stay may properly be granted under section 4(3). On the hand the Appellant's counsel was correct to contend that the Magistrates' Court ought not to have forwarded the record to the Supreme Court before the notice of appeal had been filed: section 10(1). The forwarding of the appeal record before the notice of appeal was filed was a procedural irregularity in terms of a failure to strictly comply with the provisions of section 10(1). However, it does not follow that no appeal existed at all because the consequences of non-compliance results in all subsequent steps being a nullity. It is a question of construction of the statute whether or not Parliament must be deemed to have intended such a result. As this Court observed in *R-v- Carne; Correia* [2014] SC (Bda) 9 Civ (2 May 2014), [2013] Bda LR 47, [2014] 84 WIR 163:

> "*65. According to general principles of statutory interpretation, particularly (but not exclusively) where provisions are procedural in nature, the task of the Court is to determine what consequences Parliament intended to flow from the non-compliance in question. This entails a context-driven analysis of the function of the requirement and the extent to which there has been complete or merely partial non-compliance. In Ravichandran-v-Secretary of State for the Home Department; R-v-Secretary of State for The Home Department, ex parte Jeyeanthan [1999] EWCA Civ 3010, Lord Woolf MR observed:*
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> > *'The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the noncompliance. This*

> *has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as "shall" or "must" is used….*
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> *I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows:*
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> > *(1) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
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> > *(2) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.*
> >
> > *(3)If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)*
>
> *Which questions arise will depend upon the facts of the case and the nature of the particular requirement.* "[2]

7. The answer to the question of whether Parliament be presumed to have intended the failure to strictly comply with section 10(1) of the Civil Appeal Act 1971 to result in this Court being deprived of jurisdiction to entertain or dismiss the relevant appeal is ultimately obvious. The aim of the Act is facilitate the expeditious hearing of appeals. If the record is forwarded form the trial court to the appellate court more quickly than is required, and before a notice of appeal has been served, Parliament must not have intended the appellant to be required to start the process again. Parliament must be presumed to have intended that this Court could receive the notice of appeal, give directions to facilitate the hearing of the appeal and hear and/or dismiss the appeal, even though the record was prematurely forwarded to this Court. The contrary construction of the statute would lead to absurd results.

8. The Act (section 10(2)) expressly contemplates that an appeal may proceed where the notes of evidence are not produced. This is consistent with the notion that the goal of

[2] Pages 2-3, 8-9.

the legislative scheme is to facilitate the expeditious hearing of appeals on their merits, not imposing procedural impediments to the efficient processing of appeals. Mr. Johnston's related argument that the 'record' forwarded to the Supreme Court and collected by his client was not a record at all is therefore also misconceived.

9. The same reasoning applies to the failure to comply with the tight time-limits imposed for forwarding the record to the Supreme Court (7 days) by section 10(1) of the Act.

Summary

10. Although the Appellant is correct that the Act only provides for the record of appeal to be forwarded to the Supreme Court by the Magistrates' Court after a notice of appeal has been filed, failure to comply strictly with section 10(1) does not *per se* deprive the Supreme Court of jurisdiction to deal with an appeal. Substantial compliance with the statute, depending on the facts from case to case, may be enough.

Findings: was there substantial compliance with section 10(1) of the Civil Appeals Act 1971 such that the Supreme Court was seized of the appeal?

11. I find that this Court had jurisdiction to deal with the appeal because:

    (a) the Appellant waived strict non-compliance with section 10(1) by requesting this Court to assume control of the appeal by directing the Magistrates' Court to supplement the record by producing a typed version of the notes on June 19, 2014 before filing a notice of appeal;

    (b) having obtained the benefit of a stay of execution of the Judgment in or about late March 2013, the Appellant was under a positive duty to expedite the appeal and insisting on strict compliance with section 10(1) would have caused unreasonable delay;

    (c) the Respondents were accordingly entitled to seek this Court's assistance to compel the Appellant to diligently prosecute the appeal or seek its summary dismissal;

    (d) the Respondents' Summons was validly listed for hearing on January 15, 2015 and to the extent that compliance with section 10(1) continued to be relevant at all at this stage (which must be doubted) its requirements had been substantially met.

Findings: merits of application to dismiss appeal

12. Mr. Johnston forcefully argued that his clients' ability to pursue his appeal rights had been impeded by inefficiency on the part of the Court's administration. It is true that it ought not to have taken from March 25, 2013 until January 29, 2014 to prepare a record consisting of photocopied 140 pages including a typed judgment of 11 pages. It is also true that the delay in producing a typed copy of the Magistrates' notes of evidence was excessive and that, if the Magistrates' Court was properly resourced with a recording system comparable to that installed in the Supreme Court, an audio recording of the trial could have been more promptly produced. However, properly analysing the relevant facts, it is not permissible for the Appellant to:

    (a) obtain a stay before filing notice of appeal based on the implicit representation that he believes he has an arguable ground of appeal;

    (b) refrain from filing a notice of appeal on the grounds that he requires a legible transcript of the notes of evidence in order to identify grounds of appeal; and

    (c) resist an application to dismiss the appeal, in substance for want of prosecution, on the primary ground that he has not had a sufficient opportunity to formulate a notice of appeal.

13. The Appellant's counsel advanced no coherent or tenable justification for failing to file a notice of appeal based on an analysis of the Judgment alone. I find that the Appellant either :

    (a) ought to have been able to identify arguable grounds of appeal based on the typed Judgment supplied as part of the record signed on January 29, 2014 and collected on February 13, 2014 by the Appellant and instructions filed which justified seeking a stay on the strength of a mere notice of intention to appeal on or about March 25, 2013; or

    (b) the Appellant abused the appeal process by filing a notice of intention of appeal and seeking a stay without good cause for believing that arguable grounds of appeal existed.

14. Accordingly, I find that the appeal should be dismissed with prejudice on the grounds that either:

    (a) the Appellant's failure to file a notice of appeal and /or to progress the hearing of the appeal after receipt of the record on February 13, 2014 constitutes an abuse of the process of this Court having regard to his failure to comply with section 6(1)(a) of the Act as read with section 12; and/or

(b) the Appellant's general failure to prosecute his appeal with reasonable diligence after judgment was entered in favour of the Respondents on September 24, 2012 having obtained a stay of execution on or about March 25, 2013 is a flagrant abuse of the appellate processes of the Magistrates' Court and the Supreme Court under the Act[3].

15. In future cases, a stay of execution ought not to be granted based on a notice of intention to appeal alone unless the Magistrates' Court is satisfied that proper grounds for granting a stay have been made out. Once the appellant has been supplied with a copy of the record (with or without typed notes of evidence) including a legible or typed copy of the judgment, it will in most cases be an abuse of process for the filing of a notice of appeal to be delayed on the grounds that it is necessary to have a typed copy of the notes of evidence. It will also ordinarily be an abuse of process to seek a stay in circumstances where arguable grounds of appeal cannot be made out when the stay application is made. The following principles ought to be applied in the Magistrates' Court when considering a discretionary stay at the notice of intention to appeal stage:

> "*7. Order 2 rule 37 of the Rules of the Court of Appeal provides as follows:*
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> *'37 Upon the application of an intending appellant, the Court or a Judge may stay the execution of any judgment of the Supreme Court until the determination or other disposal of the appeal:*
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> *Provided that no application under this Rule shall be entertained until it is shown to the satisfaction of the Court or a Judge that application for a stay of execution has been made to the Supreme Court and has been refused."*
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> *8. The applicable principles under this rule were essentially common ground. Special circumstances are required for seeking a stay, and the Court has a broad discretion to take into account the relative risks of injustice to either party. The Applicant invited the Court to take into account the fact that it was in liquidation and if the monies due to the Respondents were paid over and could not be recovered after a successful appeal, the unsecured creditors of the Applicant would all be prejudiced.*
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> *9. The most important factor, when considering an application for a stay in cases where there is no suggestion that the applicant/defendant would be ruined by meeting the judgment and/or that the appeal might be stifled, is the risk that the respondent/plaintiff may currently be or may in the foreseeable*

[3] When a draft of the present Judgment was circulated, the Appellant's counsel invited the Court to exercise its discretion to reconsider or rehear the appeal. I declined to exercise this discretion as it appeared to me that the reasons for the present decision were in substance based on an analysis of the Act and the record which counsel had fully addressed in argument. This Judgment was not to my mind, to any material extent at least, based on any new legal or factual points.

future become impecunious and unable to repay the judgment proceeds if the appeal succeeds. Ancillary to this concern is the risk that a local and/or foreign respondent/plaintiff might refuse to repay the monies and erect procedural obstacles in the successful appellant's path. The threshold for justifying a stay may also be lowered where it is clear that the delay involved will be comparatively short.

10. In hostile litigation, it will often be obvious without the need for evidential support that the refusal of the successful party to formally undertake to retain in the jurisdiction or at least to repay the judgment proceeds if the appeal succeeds suggests a serious risk that the stay applicant will be prejudiced if his application is refused. However, where the successful party is admittedly solvent and reputable, has demonstrated no ill-will to the applicant and openly promises to repay the judgment proceeds if the appeal succeeds, some evidential meat must be added to the bare bones of a submission that the stay applicant will be prejudiced because there is a risk that the judgment monies cannot conveniently be retrieved. This will particularly be the case where the stay applicant admittedly has sufficient funds to both meet the judgment and pursue his appeal."[4]

16. The provision in section 8 of the Act for an automatic stay when a notice of appeal has been filed ought, in my judgment, to be repealed. It works injustice for litigants, typically ordinary citizens for whom the prompt recovery of judgment debts is likely to be of considerable importance to them, who have succeeded in the Magistrates' Court. This position is inconsistent with the position in the Supreme Court and incompatible with the central function of the summary courts of providing quick and inexpensive justice for litigants with small claims, and potentially infringes judgment creditors' constitutional right to a fair hearing within a reasonable time.

17. Mr. Swan estimated his costs in this Court overall at $3500 or $2000 for the effective hearing of his strike-out application alone. Mr. Johnston conceded he could not resist an order for his client to pay the costs of the present hearing when he was unable to proceed due to lack of instructions.

18. Having regard to the findings I have reached, I find that the Respondents should be awarded all their costs in respect of attempting to bring this abusive appeal to an end on an indemnity basis. I summarily assess those costs in the amount of $3000.

Dated this 21st day of January, 2015 _____

IAN R.C. KAWALEY CJ

[4] *Kingate Global Fund Ltd and Kingate Euro Fund Ltd.-v- Bank of Bermuda (HSBC) et al* [2009] Bda LR 48 (Kawaley J).