IN THE COURT OF APPEAL
TURKS AND CAICOS ISLANDS

Appeal No. CL-AP 4/21
from CL 89/19

BETWEEN:

NADIA OUTTEN

Appellant

-and-

NEMIAH MISSICK
DANIELLE MISSICK

Respondents

Before:

The Hon. Mr. Justice C. Dennis Morrison, P
The Hon. Mr. Justice Humphrey Stollmeyer, JA
The Hon. Mr. Justice Stanley John, JA

Appearances:

Robert d'Arceuil instructed by D'Arceuils for the Appellant
Shantae Francis instructed by Misick & Stanbrook for the Respondents

Date heard: 26th January, 2022

Date delivered: 8th March, 2022

JUDGMENT

MORRISON P

Introduction

1. Before the court were two applications. The first in time was the respondents' application dated 7 June 2021 to strike out a notice and grounds of appeal filed by the

appellant on 7 April 2021 ('the strike-out application')[1]. The principal ground of this application was that there was no competent appeal before the court, the appellant having failed to comply with the requirements of section 15(1) of the Court of Appeal Ordinance ('the Ordinance'), which provides that the appellant in a civil appeal must file and serve notice of intention to appeal within 28 days.

2. Initially, the respondents also relied on a second ground, which was that, before filing notice of intention to appeal, the appellant had failed to obtain leave to appeal from the decision in the court below. However, the respondents did not pursue this ground and nothing more needs therefore be said about it.

3. The second application was the appellant's application dated 14 January 2022 for (i) a declaration that the notice of intention to appeal filed on 7 April was within the time prescribed by section 15(1); and (ii) alternatively, an extension of the time within which to appeal, under the provisions of section 19(1) of the Ordinance ('the declaration/extension of time application')[2].

4. Both applications therefore raised the issue whether the appellant's notice of intention to appeal dated 7 April 2021 was in time, given the provisions of section 15(1) of the Ordinance. Additionally, the declaration/extension of time application, which was opposed by the respondents, raised the issue whether this court has the power to extend time under the provisions of section 19(1) of the Ordinance, or otherwise.

5. The applications came on for hearing before us on 26 January 2022. At that time, with the concurrence of the parties, the court determined that it would be convenient to hear the declaration/extension of time application first, given that the success of that application would, subject only to the question of costs, be substantially determinative of the issues raised by the strike-out application.

6. After hearing submissions from Mr Robert d'Arceuil for the appellant and Miss Shantae Francis for the respondents, we refused both limbs of the declaration/extension of time

[1] Notice of Motion to Strike Out Notice and Grounds of Appeal
[2] Notice of Motion for Declaration and Extension of Time

application, holding that the appeal was not filed in time and that this court had no power to extend the time. We also ordered that the respondents should have their costs of the application, such costs to be taxed if not agreed by 28 February 2022.

7. Upon Miss Francis then withdrawing the strike-out application, the court awarded 30% of the costs of this application to the appellant, such costs also to be taxed if not agreed by 28 February 2022.

8. These are my reasons for concurring in the making of these orders.

The background to the applications

9. In a judgment handed down in open court on 23 February 2021, the learned Chief Justice ('the Chief Justice') upheld the respondents' claim that the appellant had encroached upon land owned by them at Block 7, Parcel 32, Cheshire Hall, Richmond Hill ('the land'). The Chief Justice accordingly rejected the appellant's defence, which was that he had obtained title to the land by prescription under section 135 of the Registered Land Ordinance, by virtue of his having occupied the land for over 20 years.

10. In the result, the Chief Justice made the orders sought by the respondents as follows:
    (i) that the appellant do forthwith pull down and remove the structure built by him, his employees or agents on the land to the extent of 0.06 acres;
    (ii) damages for trespass to be assessed following the pulling down of the structure;
    (iii) interest on such damages assessed; and
    (iv) costs of the action.

11. The formal order in terms of the Chief Justice's judgment was filed on 10 March 2021.

12. On 7 April 2021, the appellant filed notice of intention to appeal against the Chief Justice's judgment, on a number of grounds which it is not now necessary to rehearse. However, the notice was not served on the respondents until the following day, 8 April 2021.

13. It is in these circumstances that the respondents filed the strike-out application on 7 June 2021, which then led to the filing of the declaration/extension of time application on 22 January 2022.

The statutory framework

14. Section 15(1) of the Ordinance provides that an appeal against a judgment of the Supreme Court in civil proceedings -

> "... shall be brought by the appellant giving notice in writing, within twenty-eight days of the judgment, decree or order from which the appeal is made, to the Registrar of the Supreme Court, and to the opposite party or parties in the action, of his intention to appeal and also the general grounds of his appeal."

15. Under the rubric, 'Powers which may be exercised by a single judge', section 19(1) provides as follows:

> "The powers of the Court under this Ordinance –
>
> (a) to extend time within which notice of appeal may be given;
>
> (b) to assign counsel to an appellant;
>
> (c) grant leave for an appellant to be present at any proceedings of the Court;
>
> (d) to admit an appellant to bail; or
>
> (e) to make any order for the preservation of any property pending the determination of an appeal,
>
> may be exercised by a single judge in the same manner as they may be exercised by the Court and subject to the same provisions."

The appellant's submissions

16. Mr d'Arceuil submitted, firstly, that the time for filing notice of appeal should be reckoned from the date of filing of the formal order, that is, 10 March 2021.

Accordingly, notice having been filed on 7 April 2021, that is, the 28th day after 10 March 2021, the appeal was properly before the court.

17. Secondly, and alternatively, Mr d'Arceuil urged the court to extend the time for giving notice of appeal, as section 19(1) empowered it to do.

18. Mr d'Arceuil referred us to the decision of Allen P, sitting as a single judge of the Court of Appeal of The Bahamas, in **Esther Taylor v Meisha Ferguson**[3] ('**Taylor v Ferguson**'). In that case, Allen P heard an application for an extension of time within which to appeal under the Court of Appeal Rules of The Bahama Islands ('the Bahamas Rules'). Although the application was ultimately refused on its merits, Mr d'Arceuil's real point, as I understood it, was that (i) there was no question as to Allen P's jurisdiction to entertain the application in that case; and (ii) since, as is well known, rule 4(1) of the Court of Appeal (Practice and Procedure) Rules of the Turks and Caicos Islands provides that the Bahamas Rules, "shall apply *mutatis mutandis* to appeals from the Supreme Court ...", neither should there be any question as to this court's jurisdiction in this case.

The respondents' submissions

19. Miss Francis submitted that the appellant's notice of intention to appeal, which was served on the respondents on 8 April 2021, was not served within 28 days of the date of the formal order and there was therefore no perfected appeal before the court. In any event, Miss Francis submitted, the time for appealing ran from the date of the Chief Justice's decision on 23 February 2021 and, on that basis, the appeal was clearly out of time. And finally, that in accordance with the established jurisprudence of this court, the court had no jurisdiction to make an order extending the time limited by section 15(1) of the Ordinance.

20. Miss Francis relied heavily on two previous decisions of this court, **Inversiones Globales Ltd v Hape**[4] ('**Inversiones**') and **Attorney General v Robinson and**

[3] SC Civ App No. 194 of 2011, judgment delivered 6 February 2012
[4] [2000] TCA J. No. 12, Civil Appeal C.L. 01/2000

Bishop[5] ('**Robinson and Bishop**'). In both cases, it was decided that the court had no jurisdiction to extend the 28-day period limited by section 15(1) for the filing and service of civil appeals.

21. In the latter case (in which Mr d'Arceuil also appeared) Mottley JA, as he then was, explained the position in this way:

> "Section 15 establishes the manner in which an appeal from a decision of the Supreme Court in its civil jurisdiction is to be brought. An appellant is required to comply with each of the following elements to perfect the appeal. He must: -
>
> (i) give notice to the Registrar of his intention to appeal;
> (ii) the notice must be in writing;
> (iii) this notice of intention to appeal must be given within 28 days of the judgment, decree or order from which the appellant is appealing;
> (iv) the appellant must give to the other party to the proceedings, notice of this within 28 days of the judgment etc;
> (v) the notice must state the general grounds of his appeal."
>
> (Emphasis in the original)

22. Then, after describing section 15[6] as having established a "rigid regime" for the bringing of an appeal from a civil judgment of the Supreme Court, Mottley JA went on to point out[7] that "[a] perusal of the Ordinance shows that no power is given to the Court to extend the time within which an appeal is to be filed".

[5] (CR-AP/20) [2014] TCACA 4 (4 July 2014)
[6] At para 6
[7] At para 7

23. As appears clearly from Mottley JA's concluding words, the court did not consider this to be a happy outcome:

> "Before leaving this appeal, the Court wishes to make the following observations. **The absence of provisions in the Ordinance which gives power to this Court to extend the time limit for appealing creates undue hardship on an appellant who has to return to the Supreme Court to make the application for leave to appeal to the Court. The absence of the power creates an unnecessary delay in the progress of the appeal. In our view, the Ordinance should be amended to give the Court of Appeal the power to extend the time for filing the appeal.** This power should be exercised by a single judge of the Court of Appeal; if leave to extend is refused, the Applicant should have the right to renew his application before the Court of Appeal itself. The provision to extend time for appealing could be exercised by a judge of the Supreme Court sitting as a judge of the Court of Appeal."
>
> (Emphasis in the original)

24. To similar effect, I should also mention the later decision of this court in **Woodville Court Limited v Nancy Lucille Peters**[8], in which Mr d'Arceuil again appeared. In an *ex tempore* judgment delivered by Stollmeyer JA, the court reiterated the position so clearly established by the previous pair of cases. In addition, the court made it clear that, on a plain reading of section 15, "... the making of an Order [judgment or decree] takes place when the judgment is pronounced or delivered". In other words, the time for filing an appeal will run from the date on which the order, decree or judgment in issue in pronounced or delivered, not from the date on which it is entered or perfected.

25. The court also considered the effect of section 19 of the Ordinance in this context. Disagreeing with Mr d'Arceuil's submission that section 19, which speaks to the powers

[8] Civil Appeal 10 of 2018, judgment delivered 1 November 2018

of a single judge, was effective to confer jurisdiction on the court to extend the time for filing a civil appeal, Stollmeyer JA said this:

> "Section 19 delegates, to use the word advisedly, certain functions of the full court to a single judge. Section 19(1)(a) sets out that a single judge may grant extension of time to file an appeal. However, it would be more than passing strange, if a single judge had greater jurisdiction than the full court, and the full court does not have that jurisdiction."

26. Mr d'Arceuil's answer to Inversiones and Robinson and Bishop was to urge the court to treat them as wrongly decided and decline to follow them, under the doctrine of the well-known decision of the English Court of Appeal in Young v Bristol Aeroplane Co. Ltd. In that case, as will be recalled, it was decided that, while the Court of Appeal is generally bound to follow its own decisions and those of courts of co-ordinate jurisdiction, it is not so bound in relation to a previous decision of its own if it is satisfied that, among other exceptions, the decision was given per incuriam. As an example of a matter falling in this category, the court instanced a case in which a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.

Conclusions and disposal

27. I will say first of all that, in my view, there is absolutely no basis for the application of the *per incuriam* rule in relation to any of the previous decisions of this court on the proper interpretation of sections 15 and 19 of the Ordinance. Despite Mr d'Arceuil's robust submission[9] that "the interpretation of its powers by the Court in **Robinson and Bishop** and **Inversiones** are ... averse to the very powers which the Court inherently must have in order to operate ...", both decisions are, as it seems to me, fully justified by the plain language of the Ordinance. They may therefore be taken to be fully representative of the will of the legislature in the Turks & Caicos Islands.

[9] Reply submissions dated 21 January 2022, para 25

28. In **Robinson and Bishop**, Mottley JA explained the rationale in this way[10]:

> "... the requirement for Notice to be served on the respondent is to prevent an abuse of the system by an appellant who gives Notice to the Registrar and then does not prosecute the appeal thereby depriving the respondent of the fruits of his victory. Further, the requirements for service on the opposite party within 28 days is to enable that party to ensure that the appellant has complied with the requirement of section 15 of the Ordinance. Such requirements include giving notice of his intention in writing to the Registrar within 28 days of the judgment etc. and that the general grounds of appeal are set out."

29. Secondly, as regards Mr d'Arceuil's reliance on Allen P's decision in **Taylor v Ferguson**, I think it is sufficient to observe that, in **Inversiones**, this court pointed out that, insofar as any of the Bahamas Rules confer power in the court to extend time within which to appeal, they "are clearly repugnant to Section 15 of the Ordinance"[11]. In other words, in light of the conflict between the Bahamas Rules and the Ordinance in respect of the court's power to extend the time for appealing in civil cases, it is plainly the latter which must prevail.

30. And thirdly, as regards the court's power to extend time in civil cases, I would only add that I am fortified in the view that the Ordinance in its present form must be taken to represent the intention of the Legislature by the enactment of the Court of Appeal (Amendment) Ordinance in 2018[12]. Under section 3 of that measure, section 11 of the Ordinance was amended to add the following proviso in relation to the time for appealing in criminal cases:

> "Provided that a judge of the Court of Appeal or the Supreme Court may at any time extend the time within which notice of appeal or of application for leave to appeal may be given."

[10] At para 6
[11] **Inversiones**, per Campbell JA at para 27
[12] Ordinance 26 of 2018

31. In my view, the fact that no similar amendment has to date been made in respect of civil appeals, notwithstanding this court's explicit entreaties in **Robinson and Bishop**, may also be taken as clear confirmation of the legislative intent in this regard.

32. In light of the provisions of the Ordinance and the binding decisions of this court on their proper interpretation, therefore, I would restate the position in respect of appeals in civil cases as follows:

    (1) Section 15 of the Ordinance requires that a prospective appellant from a decision of the Supreme Court must give written notice of his intention to appeal to the Registrar and the opposite party or parties within 28 days of the date of the decision from which it is sought to appeal.

    (2) The 28-day period limited for giving notice of intention to appeal is to be reckoned from the date on which the judgment, decree or order from which it is sought to appeal was given or pronounced.

    (3) The Court of Appeal has no power to extend the time limited for giving notice of intention to appeal.

33. In this case, the 28-day period for filing notice of intention to appeal from the Chief Justice's judgment therefore began to run from 23 February 2021, which is the date on which it was given. The notice of intention to appeal filed on 7 April 2021 was therefore out of time. In any event, even on the assumption that time did not begin to run until 10 March 2021, the date on which the formal order was filed, the appeal would still have been out of time. This is because the notice of intention to appeal filed on 7 April 2021, the 28th day after the filing of the formal order, was not served on the respondents until the following day.

34. Accordingly, there being no power in the court to extend the time for filing and serving notice of intention to appeal, it followed that the declaration/extension of time application was bound to fail, with the consequence that the respondents were entitled to their costs on the application.

35. In the result, as I have indicated, the strike-out application was quite properly withdrawn by Miss Francis. As a consequence, the court considered that the appellant was entitled to 30% of his costs of preparing to meet that application.

Postscript

36. In submissions made on behalf of the Attorney General in **Inversiones**, the court was told that the absence of any power in section 15(1) to extend the time for bringing a civil appeal "cannot be in the public interest"[13]. I entirely agree. I would therefore urgently reiterate Mottley JA's recommendation in **Robinson and Bishop** that "the Ordinance should be amended to give the Court of Appeal the power to extend the time for filing the appeal".

8th March, 2022

/s/ C. Dennis Morrison P

I agree.

/s/ Humphrey Stollmeyer JA

I also agree.

/s/ Stanley John JA

[13] See judgment of Campbell JA at para 15, recounting the submissions of Andrew Mitchell QC for the Attorney General.