

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 10 of 2015

BETWEEN:

ALICIA BECKLES

**Acting herein as the Personal Representative
of the Estate of Peter Beckles**

Appellant

AND

BARBARA CORBIN

Respondent

**Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and
The Hon Kaye C. Goodridge, Justices of Appeal.**

2015: November 24

2016: February 16

Mr. Hal McL. Gollop, QC for the Appellant.

Mr. Bryan L. Weekes for the Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] This is an application by the respondent for an order that the appeal filed by the appellant be dismissed as incompetent.

Background

- [2] The claimant, Mr. Peter Beckles, filed a claim against the defendant/respondent, Ms. Barbara Corbin, in which he sought an order setting aside the conveyance of property situated at No. 11 Brighton Crescent in the parish of St. Michael on the ground of fraudulent acquisition. On 26 September 2014, **Cornelius J** dismissed the claim and ordered the claimant to pay the costs of the respondent to be agreed or assessed.
- [3] The claimant died on 21 February 2015.
- [4] The perfected order was entered on 22 May 2015.
- [5] On 8 June 2015 the appellant, who is the personal representative of the claimant, filed a notice of appeal against the decision of **Cornelius J**. At paragraph 4 of the notice, the appellant asked this Court to set aside "the order given on 22 May 2015".

The Application

- [6] On 1 July 2015 the respondent filed an application pursuant to **rule 62.8(6)** of the **Supreme Court (Civil Procedure Rules) 2008 (CPR)** for an order that the appeal be dismissed as incompetent. The grounds of the application are as follows:

"1. That the decision of the High Court in this matter was handed down by Madam Justice Cornelius on the 26th day of September, 2014.

2. Any appeal from the decision of **Cornelius J** herein should have been filed within 28 days of the 26th day of September, 2014.

3. Mr. Peter Beckles died on the 21st day of February, 2015.

4. The appellant herein has not applied for an Order extending the time for filing an appeal out of time as is required by CPR 2008 Part 62.6(2) or (3)."

[7] No affidavit was filed in support of the application.

[8] When the application came on for hearing on 24 November 2015, oral submissions were made by the attorneys-at-law for the parties. On conclusion, the Court acceded to the request of counsel that they be allowed 14 days within which to file written submissions on the issue of incompetence. Counsel for the appellant, Mr. Hal Gollop QC, filed his submissions on 29 December 2015. Counsel for the respondent, Mr. Bryan Weekes, filed his submissions on 4 December 2015.

The Submissions of Counsel

[9] Mr. Weekes submitted that the appeal to this Court from the decision of **Cornelius J** was an appeal as of right. That being the case, the notice of appeal should have been filed within the time frame prescribed by **rule 62.6(1)**. Once that time frame had elapsed, the appellant was required to file an application pursuant to **rule 62.6(3)**

for leave to file the notice of appeal out of time. No such application had been made.

[10] Mr. Weekes cited **June Blackman aka June Gill v Elma Carmen Gittens-Blackman [2014] CCJ 17 (AJ) (Blackman)** and **Andrew Lovell v The Queen [2014] CCJ 19 (AJ)**. He acknowledged that these decisions were not based on **rule 62.6(3)** but he nevertheless considered that they could be of assistance to the Court. Mr. Weekes submitted that in both cases the **CCJ** held that because there had been no application for leave to file the respective applications for special leave out of time, the Court simply had no jurisdiction to entertain the applications.

[11] Counsel drew the Court's attention to **para [5]** of **Blackman** where the **CCJ** stated:

"[5] By Rule 10.12 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2005 as amended (the Rules) an appeal must be filed within 42 days of the date of the judgment appealed from. "Judgment" is defined in Rule 1.2 of the Rules as including "an order, ruling or final decision of the Court". Since the Court of Appeal's decision was made on November 1, 2012 the application filed on June 25, 2014 is woefully out of time. The Applicant has exacerbated her error by not making any application for an extension of time to seek special leave to appeal. In the absence of such an application this Court has no jurisdiction (sic) entertain the special leave application. Therefore the decisions of the trial judge and of the Court of Appeal remain undisturbed."

[12] Mr. Weekes concluded his submissions by stating that, since no application for an extension of time within which to file a notice of appeal had been made, the Court had no jurisdiction to entertain the appeal and the appeal should be dismissed as incompetent.

[13] In response, Mr. Gollop QC submitted that it was necessary to distinguish between the terms "order" and "judgment" as a judgment is normally in writing and signed by the judge. He referred to **Black's Law Dictionary** which defines "judgment" as "the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. Decision or sentence of the law pronounced by the court and entered upon its docket, minutes or record". He continued that "order" is defined as "direction of a court or judge made or entered into writing, and not included in a judgment". Counsel cited **Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801** and **Hyams v Plender [2001] 2 All ER 179**.

[14] Mr. Gollop QC submitted that no written judgment was handed down by **Cornelius J** on 26 September 2014 when her decision was given. The order was only filed on 22 May 2015 and received by him on 26 May 2015. In the event that the order is considered as the

final judgment, Mr. Gollop QC's submission is that, having received the order on 26 May 2015, the filing of the notice of appeal on 8 June 2015 was within the requisite time period allotted by the **CPR**, that is, 28 days of the date when the order was made.

[15] Counsel's final submission was that counsel for the appellant filed the notice of appeal as soon as he was in receipt of the perfected order. There was therefore no need to file an application for an extension of time to seek "special" leave to appeal.

The Applicable Rules

[16] The time limits for the filing of appeals are set out in **rule 62.6** which states:

"Rule 62.6 Time for filing Notice of Appeal

- (1) The notice of appeal must be filed at the Registry
 - (a) in the case of a procedural appeal, within 14 days of the date on which the decision appealed against was made,
 - (b) where leave is required, within 14 days of the date when leave was granted; or
 - (c) in the case of any other appeal within 28 days of the date when the order or judgment appealed against was made or

given, or any later date fixed by the court below."

[17] **Rule 62.7** provides for the service of the notice of appeal on all parties to the proceedings. According to **rule 62.8 (1) and (5)** a respondent may file a cross-appeal or notice of contention as the case may be.

[18] In particular, **rule 62.8(6) to (8)** provides:

"(6) A respondent may apply on notice at any time for an order that an appeal is dismissed as being incompetent.

(7) On an application under sub-rule (6), the burden of establishing competency is on the appellant.

(8) Where a respondent does not apply under this sub-rule, but at the hearing the court dismisses the appeal as being incompetent, the respondent shall not, unless the court otherwise orders, receive any costs of the appeal, and the court may order that the respondent pay the appellant any costs of the appeal proven to be useless or unnecessary."

Discussion

[19] This was not a procedural appeal or an appeal for which leave was required. It was an appeal as of right. Therefore **rule 62.6(1)(c)** required the appellant to file the notice of appeal within 28 days of the date when the order or judgment was made or given.

[20] Mr. Gollop QC contended that the order means the perfected order and the appellant had 28 days from 22 May 2015 within which to

file an appeal. We disagree with this contention for the following reasons.

[21] First, this contention ignores **rule 42.8** which states:

"42.8 Time when judgment or order takes effect

A judgment or order takes effect on or from the day it is given or made, unless the court specifies that it is to take effect on a different date."

[22] Second, the order dismissing the appellant's claim was given orally by the judge in the presence of counsel for both parties on 26 September 2014. No written decision was given. Therefore, when **Cornelius J** delivered her oral decision, it took effect from the time when the judge pronounced it (not from the time the order was drawn up, sealed and served). The effective date for the purposes of **rule 62.6(1)(c)** was 26 September 2014.

[23] We turn now to consider whether we should exercise our discretion in favour of the respondent and dismiss the appeal as incompetent.

[24] **Rule 62.6(8)** provides an avenue for a respondent to challenge an appeal which appears not to conform with the provisions of **CPR**. This is in keeping with the general tenor of **CPR** in promoting efficiency and the timely disposition of cases.

[25] Under the former Rules of the Supreme Court, 1982, a respondent could apply to the Court to dismiss an appeal for want of prosecution (O.59.r.20) where an appellant failed to file the record of appeal within the time prescribed (O.59.r.18).

[26] It must be pointed out that there is no rule similar to **rule 62.6(8)** in the Civil Procedure Rules of Trinidad and Tobago, Jamaica or the Eastern Caribbean. However, a similar rule appears in the Uniform Civil Procedure Rules 2005 which were made under the Civil Procedure Act 2005 of New South Wales, Australia (rule 51.41).

Rule 51.41 provides:

“51.41 Objections to competency of appeal

- (1) A respondent who objects to the competency of an appeal must, by notice of motion filed and served on all other parties to the appeal within 28 days after service on the respondent of the notice of appeal, apply to the Court for an order dismissing the appeal as incompetent.
- (2) If the respondent fails to comply with sub-rule (1) and the appeal is nevertheless dismissed as incompetent:
 - (a) the respondent is not entitled to costs of the appeal unless the Court otherwise orders; and
 - (b) the Court may order the respondent to pay the appellant any costs of the appeal proving useless or unnecessary.”

Unlike our **rule 62.8(7)**, rule 51.41 places no burden on the appellant to establish competency.

[27] The case of **Donnelly v Australia and New Zealand Banking Corporation [2015] NSWCA 233 (Donnelly)** is a decision of the court of appeal of New South Wales on the question of competency. In **Donnelly**, the respondents sought an order that the notice of appeal filed by the appellant on 17 June 2015 be dismissed as incompetent. The basis of the application was that the decision of Drake J dismissing the action brought by the appellant was interlocutory and therefore leave was required pursuant to section 101(2)(e) of the Supreme Court Act 1970 (NSW). The court (per Beazley P) held that the basis of incompetence had been made out since leave was required. The notice of appeal was dismissed as incompetent and the appellant was ordered to pay the respondent's costs.

[28] In this case the appellant ought to have filed the notice of appeal within 28 days of the decision given on 26 September 2014. This was not done. The notice of appeal having been filed outside the prescribed time limit and no application for an extension of time

under **rule 62.6(3)** having been made, we hold that the basis of the incompetence has been made out.

[29] Further, we are of the view that the appellant has not discharged the burden imposed by **rule 62.8(7)** of establishing competency. We have therefore concluded that the appeal should be dismissed as incompetent.

The Issue of Costs

[30] This was a procedural application. We must now consider whether costs should be awarded to the respondent in view of our determination on the application.

[31] **Rule 65.11** sets out the procedure to be followed by this Court when it is assessing costs in respect of procedural applications.

[32] According to **rule 65.11(2)**, the general rule is that the unsuccessful party must pay the costs of the successful party. No representations have been made to this Court that the general rule ought not to be applied in this case. Accordingly we have determined that the general rule should apply. The respondent is therefore entitled to costs.

[33] In assessing those costs, we have been guided by the provisions of **rule 65.11(4) to (7)**. We note that the claim was not for a monetary

sum. It was for the setting aside of a conveyance. We have taken all the factors into account and have arrived at the amount of \$2,000 which we consider to be fair and reasonable in the circumstances.

Disposal

[34] The appeal is dismissed as incompetent. The appellant shall pay the respondent's costs which have been assessed at \$2,000 on or before 14 March 2016.

Justice of Appeal

Justice of Appeal

Justice of Appeal