

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No 15 of 2016**

**BETWEEN:**

**WAYNE OTHO ROBINSON**

**Appellant**

**AND**

**FIRST CITIZENS BANK (BARBADOS) LIMITED Respondent**

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

**2016: December 5**

**2017: April 11**

**Mr. Dennis M. Headley for the Appellant.**

**Mr. Garth St. E Patterson QC and Mr. Bartlett Morgan of Lex Caribbean for the Respondent.**

## **DECISION**

**GOODRIDGE JA**

### **Introduction**

[1] This is an application by First Citizens Bank (Barbados) Limited (the respondent) for an order dismissing the notice of appeal filed on 11 August 2016 by Wayne Otho Robinson, (the appellant). At the conclusion of the hearing, this Court allowed the application, dismissed the notice of appeal

as being incompetent and ordered the appellant to pay to the respondent costs assessed in the sum of \$5,000 on or before 31 January 2017. We now set out below our reasons for so doing.

### **Background**

- [2] In 2008 the appellant borrowed the sum of \$480,000.00 from the respondent. That sum was secured by a mortgage on property situated at West Terrace Gardens in the parish of St. James. The appellant defaulted in repaying the amounts due and on 2 July 2013, the respondent filed a fixed date claim form for an order for possession of the property.
- [3] After a number of adjournments, the application for possession came on for hearing on 23 July 2015, before **Weekes J**. Upon hearing the appellant who appeared in person and counsel for the respondent, the court adjourned the matter until 26 November 2015.
- [4] On the adjourned date, the appellant was absent. **Weekes J** then proceeded to make an order in the following terms:

"It is ordered that:

1. the Defendant deliver to the Claimant vacant possession of the mortgaged property described in the Schedule hereto on or before the 26th day of May, 2016; and
2. the Defendant pays the Claimant's Fixed Costs in the sum of \$3,500.00 plus VAT."

## **The Notice of Appeal**

- [5] On 25 May 2016, the appellant filed a notice of appeal against the decision of **Weekes J.** In the notice, the appellant asked that: (i) the order of the judge be set aside; (ii) the case be remitted to the High Court to be dealt with, adequate notice being given to the appellant; and (iii) he be awarded costs.
- [6] The appellant also sought the following relief:
- "(i) That there be a stay of execution against the order of the Honourable Madam Justice Michelle Weekes of 26 November 2015.
  - (ii) That leave be granted for the appellant (being the Defendant in the Court below) to appeal the decision of the Honourable Madam Justice Michelle Weekes in chambers on 26 November 2015.
  - (iii) That an extension of time be granted for the appellant to appeal the decision of the Honourable Madam Justice Michelle Weekes in chambers on 26 November 2015."
- [7] The notice was accompanied by an affidavit of the appellant in which he deposed that the judge was not given the opportunity to hear representations from him and as a consequence he was likely to suffer grave injustice as a result of the order. It was also stated that the judge did not fairly balance the various factors which ought to have been considered by the court before granting the order.

### **The Application to Dismiss the Notice of Appeal**

[8] According to the application filed on 11 August 2016, the respondent has asked this Court to dismiss the appeal as being incompetent pursuant to **rule 62.8(6) of CPR**, or alternatively, to strike it out in its entirety in exercise of the case management powers under **rule 62.14** and its inherent jurisdiction. The respondent also sought its costs of the application.

### **The Submissions of the Respondent**

[9] Counsel for the respondent, Mr. Bartlett Morgan, in his written submissions to, and oral submissions before, this Court, contended that the application should be granted for the following reasons:

1. The matter in the High Court was summary in nature, being an application under s **98(2)** of the **Property Act, Cap.236 (Cap. 236)**. Therefore the matter required leave to appeal;
2. No leave having been granted, the notice of appeal is a nullity and is liable to be struck out;
3. In any event, the notice of appeal was filed six months out of time;
4. Even if the notice of appeal can be treated as an application for leave, the application for leave was filed out of time;
5. Further, even if the notice of appeal can be treated as an application for leave, no prospect of success or other compelling reason for allowing the appeal has been disclosed by the appellant;
6. The appropriate course of action in response to a judgment entered in the absence of a party to proceedings is to seek to have the judgment set aside, not to appeal the judgment or order.

### **The Time Limits for the Filing of Appeals**

[10] **Rule 62.6** sets out the time limits for the filing of notices of appeal. These time limits are as follows:

1. In the case of a procedural appeal, within 14 days of the date on which the decision appealed against was made;
2. Where leave is required, within 14 days of the date when leave was granted; or
3. 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 other date fixed by the court below.

[11] **Rule 62.2 (1)** provides that where an appeal may be brought only with the leave of the court below or this Court, the application for leave must be made within 21 days of the order against which leave to appeal is sought.

### **The Court's Powers to Dismiss Appeals under Rule 62.8 - Incompetent Appeals**

[12] Where a respondent forms the view that there is some deficiency with an appeal, **rule 62.8(6)** empowers a respondent to apply on notice at any time for an order that the appeal be dismissed as incompetent. When such application is made the onus is on the appellant to establish competency.

[13] There is no definition as to what constitutes an incompetent appeal in the **CPR** and so this phrase must be given its ordinary meaning. The Court considered the issue of incompetence in its recent decision of **Beckles v Corbin Civil Appeal No. 10 of 2015 (Beckles)**. In **Beckles**, this Court dismissed an appeal as incompetent where the appellant filed the notice of

appeal outside of the prescribed time limit. There the Court explained the rationale for **rule 62.8(6)** as follows:

"[24] **Rule 62.8(6)** provides an avenue for a respondent to challenge an appeal which appears not to conform with the provisions of the CPR. This is in keeping with the general tenor of the CPR in promoting efficiency and the timely disposition of cases.

[28] In this case the appellant ought to have filed the notice of appeal within 28 days of the date 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."

[14] This Court went on to find that the appellant had not discharged the burden imposed by **rule 62.8(7)** of establishing competency and dismissed the appeal.

[15] In dealing with the issue of incompetency, this Court considered the case of **Donnelly v Australia and New Zealand Banking Corporation [2015] NSWCA 233**, a decision of the New South Wales Court of Appeal on a similar provision. In that case, the action brought by the appellant was interlocutory and leave to appeal was therefore required. It was held that the basis of the incompetence had been made out and the notice of appeal was dismissed.

## **The Issue**

- [16] The issue which we must determine is whether the appeal should be dismissed as incompetent and we begin by examining the nature of the application in the court below.

## **Analysis and Conclusion**

### *The Nature of the High Court Action*

- [17] The claim brought by the respondent in the court below was to recover possession under the terms of a mortgage and was brought under s. **98(2)** of **Cap. 236**. That section provides:

"(2) A mortgagee may apply to the court in a summary manner for possession of the mortgaged property, or any part thereof, and on such application the court may, if it thinks proper to do so, order possession of that property or part to be granted to the applicant..."

- [18] It is also provided that the court may, in order to allow time for redemption, adjourn an application or make an order for possession subject to such conditions as to stay of execution or otherwise (**s.98(3)**).

### *Was leave required to appeal the order of Weekes J*

- [19] It is the contention of the respondent that the appellant required leave to appeal, because the matter was summary in nature, having been brought under **s.98** of **Cap 236**.

- [20] **Section 54(1)(f)(iii)** of **The Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** provides:

"(1) No appeal lies to the Court of Appeal

(f) without the leave of the Court of Appeal or of the judge making the order, from

(i).....

(ii)....

(iii) a final order of a judge of the High Court made in a summary proceeding”.

[21] The question which arises therefore is whether the order made on the application for possession was a "final order made in a summary proceeding."

[22] The phrase “final order” has been defined in **Black’s Law Dictionary with Pronunciation Sixth Edition** as “one which terminates the litigation between the parties and the merits of the case and leaves nothing to be done but to enforce by execution what has been determined”. In **Black’s Law Dictionary - Deluxe Ninth Edition** (the Dictionary) it is defined as “An order that is dispositive of the entire case”.

[23] Further, the phrase “summary proceeding” has been defined in the Dictionary as “A non-jury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner.”

[24] Generally, in claims for possession of land, a fixed date claim form is required: See **rule 8.1.5(a)**. Under **Rule 66**, mortgage claims are also brought by way of a fixed date claim form. **Rule 27.2(3)** provided that on the first hearing of a fixed date claim, the court may treat the first hearing

as the trial of the action where it is not defended; or it considers that the claim can be dealt with summarily.

[25] The use of the fixed date claim form is a summary means of proceeding in the High Court when the matter is summary. Where the matter is not defended, the summary proceeding would have come to an end when the judge made the order for possession. In our view, when the court made the order for possession, this amounted to a final order in a summary proceeding. We therefore conclude that the appellant required leave to appeal in accordance with **s.54 (1)(f)(iii)** of **Cap.117A** and an application for leave should have been made within 21 days of the judge's order.

[26] By way of analogy, in **Chung and another v AIC Battery and Automotive Services Company Ltd (in receivership)** [2013] CCJ 2 (AL); **82 WIR 357**, the CCJ concluded that proceedings commenced by way of the special writ process (order 12) in the High Courts in the Republic of Guyana to gain, inter alia, possession of land amounted to summary proceedings and the order made was a final order in summary proceedings.

*What are the consequences of filing a notice of appeal without obtaining the requisite leave?*

[27] The appellant filed a notice of appeal without having obtained leave of the Court to do so. The Eastern Caribbean Court of Appeal was confronted with a similar situation in **Maria Hughes v The Attorney General of**

**Antigua and Barbuda (Maria Hughes), Civil Appeal No 33 of 2003, MacDonna v Richardson, Civil Appeal No. 3 of 2005. (MacDonna) and Nevis Island Administration v La Copproprete Du Navire et al, Civil Appeal No 7 of 2005.** In **Maria Hughes**, the ground of application to strike out the appeal was that the appeal was a procedural appeal, was out of time and in any event required leave of the court prior to filing. In granting the application, Gordon JA (ag) said:

"Having determined that the order of Mitchell J was not a final order and that any appeal there from would have to be a procedural appeal I now consider the effect of such determination. Following *Sylvester v Singh and Pirate Cove Resorts Limited v Euphemia Stephens* I am of the clear view that failure to get leave makes the notice of appeal a nullity. The application to strike out the notice of appeal is therefore granted."

[28] In **MacDonna**, Barrow JA stated:

"The "appellant's" failure to obtain leave to appeal leaves him debarred by the language of s 29(4) of the Act: "No appeal shall lie." The Court of Appeal is a creature of statute and an appeal to this court may be made only where statute confers the right to appeal. An appeal cannot exist unless a statute permits it to be brought. It is for this reason that the notice of appeal filed in this case is a nullity. A nullity cannot be cured or retrospectively validated. The Belize Court of Appeal in *Henderson v Archila* expressed the proposition thus:

"... no appeal proceedings can be commenced until leave is granted. Any notice which may have been filed without leave being first obtained is of no effect and is completely valueless and void. It cannot be revived by the subsequent granting of leave."

Accordingly, there can be no relief from sanctions."

[29] It is clear from the above authorities that, if a notice of appeal is filed in circumstances where leave is required and leave has not been obtained, the notice is a nullity and is of no effect.

[30] We therefore hold that the notice which was filed is a nullity and the basis of the incompetence has been made out. Further, the appellant did not establish the competency of the appeal as required by **rule 62.8(7)**.

*Should the notice of appeal be treated as an application for leave to file and serve a notice of appeal out of time*

[31] As was stated at para 6 above, in the notice of appeal the appellant sought (i) a stay of execution; (ii) leave to appeal and (iii) an extension of time to appeal against the judge's decision. Even if this Court were to assume that what was intended was an application for leave to file and serve a notice of appeal out of time, there are certain hurdles which the appellant would have to surmount.

[32] The order for possession was made on 26 November 2015. The approach to this Court was first made with the filing of the notice on 25 May 2016. Assuming that the application is an invitation to this Court to exercise its discretion under **rule 62.6(3)**, it would be necessary for the appellant to establish that special reasons exist which would enable the Court to grant leave for the filing and serving of a notice of appeal notwithstanding the time which has elapsed.

- [33] We note that, while there are two grounds of appeal, there are no grounds for the application for leave itself. If we excuse this failing, we are then faced with having to treat the proposed grounds of appeal as the special reasons being proffered. These grounds are (i) that there was uncertainty and/or misunderstanding surrounding the date of hearing which resulted in the appellant being prejudiced by the judge's order made in his absence, and (ii) the judge did not fairly balance the various factors which ought to be considered by the court before granting the order.
- [34] Before examining these grounds, we note that there has been no attempt by the appellant to explain why he delayed in making the application for a period of six months and only filed the application the day before the stay expired.
- [35] In **Ifill v Attorney General, Civil Appeal No. 3 of 2013, Burgess JA** discussed the considerations which this Court should take into account when determining if reasons amount to special reasons for the purposes of **rule 62.6(3)**.
- [36] Turning to the grounds, in our opinion, they cannot be considered to be special reasons within the context of **rule 62.6(3)**. First, failure to attend court on the adjourned date is, while unfortunate, merely an excuse for not attending. Second, there is no indication given as to how the judge erred in her consideration of the law to arrive at her decision.

[37] Having regard to the foregoing, we find that the appellant has not established special reasons for this Court to exercise its discretion under **rule 62.6(3)** in his favour.

[38] Further, in an application for leave it was incumbent on the appellant to establish that he has a real prospect of succeeding or that there is a compelling reason why leave should be granted: see **Financial Services Commission and Anor v British American Insurance Company (Barbados) Limited, Civil Appeal No. 4 of 2012**. This was a claim for an order for possession. The appellant did not place any evidence before the judge to controvert that of the respondent. What was before the judge was evidence that the appellant was in serious default and the judge was therefore entitled to conclude, having regard to all the circumstances, including the length of time that the matter was before the court, that the appellant would not be able to settle the debt.

[39] This being the case, the appellant has not satisfied this Court that an appeal has any real prospect of success, nor has he shown a compelling reason why leave should be granted.

[40] There is one final point. The appellant asserts that he was unable to put his position to the judge because of his absence. It was open to the appellant to avail himself of the provisions of **rule 39.5** which allows a person who was not present at a trial at which an order was made in his absence, to apply to set aside that order. Such application must be (i) made within 14

days after the date on which the judgment or order was served on the applicant (ii) supported by evidence on affidavit showing (a) a good reason for the failure to attend the hearing; and (b) that it is likely that had he attended, some other judgment or order might have been given or made.

[41] **Rule 62.21** of **CPR** is a similar provision governing this Court's discretion to set aside (i) a decision made in a party's absence, or (ii) an order striking out an appeal. In the recent decision of **T.G. Holdings Limited v Host Marriott L.P., S.L.C. Recovery Limited, Civil Appeal No. 10 of 2013**, this Court discussed at length the conditions which must be satisfied in order for the Court to exercise the discretion to set aside.

[42] The approach taken by the courts in the United Kingdom is that where an order has been made in a party's absence, the appropriate course of action is to apply to set aside that order, not to appeal it. That approach is illustrated in the case of **Williams v Hinton [2011] EWCA Civ 1123** where Gross LJ noted that the failure to exercise the set aside option (UK CPR 39.3) did not prevent the court from hearing an appeal but unusual facts would normally be required before it would do so. The appeal was allowed on the basis that at the time of filing the appeal, the court did not have the benefit of the decision in **Bank of Scotland v Pereira and others [2011] EWCA Civ 24**, a decision which clarified the law.

**Disposal**

[43] For the foregoing reasons, the notice of appeal filed herein by the appellant on 25 May 2016 is dismissed as being incompetent. The appellant shall pay the respondent its costs of the application as ordered by this Court on 5 December 2016.

Justice of Appeal

Justice of Appeal

Justice of Appeal