

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 2 of 2014

Between

SHIRLEY CLARKE

APPELLANT

-AND-

**FIRST CARIBBEAN INTERNATIONAL BANK
(B'DOS) LTD**

RESPONDENT

Before the Honourable Sir Marston Gibson, K.A., Chief Justice, the Honourable Andrew Burgess, Justice of Appeal and the Honourable Kaye Goodridge, Justice of Appeal

2014: July 4 and September 12;

2017: November 1

Mr. Hal Gollop QC for the Appellant

Mr. Edmund Hinkson for the Respondent

DECISION

GIBSON CJ:

Factual Background

[1] This is an application to extend the time for leave to appeal against the order of then Magistrate Cooke-Alleyne dismissing the action brought by appellant, Shirley Clarke, seeking damages for wrongful dismissal against respondent,

First Caribbean International Bank (Barbados) Limited. The facts are undisputed and can be briefly stated. The appellant was employed by the respondent for a period in excess of 13 years. He rose to the position of Assistant Customer Service Manager and in that capacity supervised customer service officers (CSOs). He could override transactions in excess of \$10,000.00 and when transactions of this nature were presented to the CSOs, they were required to come to him for an override. The circumstances of this matter concern transactions conducted by a longstanding customer, Margaret Daniel and the actions of the appellant surrounding those transactions.

- [2] Ms. Daniel came into the bank to deposit a cheque of USD \$96,000.00 purportedly drawn on an account at a bank in the United States of America. The CSO who attended to Ms. Daniel referred the matter to the appellant for his override so as to permit the deposit of the cheque. The appellant gave his override and instructed the CSO to place a hold on the cheque for 30 days. However, the 30-day hold was evidently never complied with because, on the following day, Ms. Daniel returned to the bank with a form allegedly approved by the Central Bank of Barbados permitting a transfer of USD \$15,000.00 of the USD \$96,000.00 deposited the day before. It should be noted that on the

second day, Ms. Daniel had gone to a different CSO who referred the transaction to the appellant for his override which he gave.

- [3] On a third occasion, Ms. Daniel returned to the first CSO she attended with another form apparently Central Bank approved for a transfer this time of USD \$60,000.00. Once again, the CSO came to the appellant for his override and, once again, he gave it.
- [4] The cheque for USD \$96,000.00 was subsequently dishonoured by the drawee bank and the respondent was unsuccessful in its attempts to recover the money from Ms. Daniel. An investigation was launched and the respondent terminated the appellant's services for, *inter alia*, not correcting the CSO's error and failing to question the source of the funds.

The Appeal and Instant Application

- [5] On 10 December 2010, then Magistrate Cooke-Alleyne had given her decision, dismissing the appellant's action against the respondent, and concluding that the appellant had violated the bank's code of conduct, and had been guilty of gross negligence and misconduct. On 17 January 2011, the appellant filed a Notice of Appeal against the decision of the magistrate.
- [6] Mr. Hinkson, counsel for the respondent bank, sought dismissal of the appeal on the ground that the notice of appeal from magistrate's decision had not been given within seven (7) days in accordance with *section 240(2)* of the

Magistrate's Court Act, Cap 116A of the *Laws of Barbados* (“*Cap 116A*”).

He submitted that the Notice of Appeal in this matter was filed some 32 days after the magistrate rendered her decision, and contended that the appeal was therefore not properly before the Court.

[7] Mr. Gollop QC, for the appellant, sought an extension of time to appeal. In his affidavit in support of the application, Mr. Gollop QC candidly admitted that “[t]hrough error or inadvertence, I was of the view that the Rules required that an appeal of this kind should be filed within 28 days.” Mr. Gollop QC sought the extension of time on several grounds including that the lapse of time between the decision and the application was minimal, a ‘mere’ 23 days, and the extension would in no way prejudice the respondent bank. He contended that *section 59* of the *Supreme Court of Judicature Act Cap 117A* had to be read together with *section 240* of *Cap. 116A*.

[8] We granted leave for the appellant to file a notice of application for leave to appeal out of time which he filed on 21 July 2014. However, we now conclude that our grant of leave to the appellant to file a notice of application was in error, since we had no jurisdiction to permit such an application, and that the application and the notice of appeal must be struck out.

Discussion

[9] *Section 240(1)* and *(2)* of *Cap. 116A* provide as follows:

- “(1) An appeal shall be commenced by the appellant giving to the clerk notice of such appeal, which may be verbal or in writing in the prescribed form, and if verbal shall be forthwith reduced to writing in the prescribed form by the clerk and signed by the appellant or by his attorney-at-law.
- (2) The notice of appeal shall, subject to subsection (3), be given *in every case within 7 days* after the day on which the magistrate dismissed the information or complaint, convicted or made the order or refused to convict or make the order or gave his judgment or decision.”

[10] This issue has been definitively settled in other Caribbean jurisdictions for some time. Fifty-four years ago, in **Stanley v Andrews (1963)5 WIR 457**, the Court of Appeal of Trinidad and Tobago was faced with the construction of **section 129(1)** and **(2)** of the Summary Courts Ordinance, provisions *in pari materia* with *section 240(1)* and *(2)* of *Cap. 116A*.

[11] The facts of **Stanley v Andrews** bear repetition here. On 19 March 1962, the appellant was convicted by a magistrate and sentenced to a period of incarceration. He immediately gave verbal notice of appeal which was reduced to writing the same day, but he never signed the written notice of appeal until 19 September 1962, some six months later.

[12] **Section 129(1)** of the Summary Courts Ordinance provided that an appeal from a magistrate’s court “shall be commenced by the appellant giving to the clerk notice of such appeal, which may be verbal or in writing, and if verbal,

shall be forthwith reduced to writing by the clerk and signed by the appellant or by his counsel or solicitor.” Subsection (2) stated that “[t]he notice of appeal shall be given in every case before the expiration of the seventh day after the day on which the court has made the order or given the refusal appealed against.”

[13] The Court of Appeal of Trinidad and Tobago held that the law required that a verbal notice should be reduced to writing and signed by the appellant as a necessary condition of its efficacy; and as he had failed to sign it within the time prescribed by the statute, there was no appeal before the Court. As to whether the Court possessed the power to extend the time to appeal, **Wooding CJ** stated at p. 458:

“There is no provision in the Ordinance anywhere that we have been able to discover whereby the time can be extended beyond the seven days specifically allowed for giving notice of appeal. Moreover, since appeal from decisions of magistrates’ courts derive their authority from the provisions of the Ordinance itself, these provisions must be read subject to such limitations or conditions as the Ordinance prescribes and, if those limitations or conditions are not observed, the consequence is that the right of appeal may be lost. Undoubtedly, in some cases, this may cause hardship to an appellant who gives verbal notice and who is not required by the clerk to sign the formal notice, or whose verbal notice the clerk fails to reduce to writing in due form. But the law requires that the reduction of the verbal notice to writing and the signing of it by the appellant be done as a necessary condition of the efficacy of the notice.

As a consequence of the conclusions which we have reached, it follows that this ‘appeal’ in the circumstances in which it is now before us is really not an appeal. The proceedings so far are really a nullity. There is nothing, therefore, for us either to confirm or to set aside.”

[14] This Court has no jurisdiction under *section 240(1) and (2) of Cap. 116A* to extend the time for giving notice of appeal. It follows that, in the absence of statutory authority, this Court did not have jurisdiction to grant the appellant leave to file an application for an extension of what would be, as **Wooding CJ** stated, “The proceedings before us are ‘really a nullity.’” There never was an appeal and so nothing to extend.

[15] Accordingly, the application must be dismissed.

Costs

[16] On 4 July 2014, Mr. Hinkson requested costs for that day’s sitting. He contended that the matter had been set down for hearing for months and that the appellant had notice of those dates. Mr. Hinkson said that it was not his client’s fault. This Court awarded costs.

[17] In written submissions dated 31 October 2014, Mr. Hinkson expanded on his oral submissions. He noted that costs had been awarded to him for the day’s sitting and recalled that, despite his having, by letter dated 2 February 2011, drawn to Mr. Gollop QC’s attention that the appeal had been filed out of time, Mr. Gollop QC had failed to file an application for leave to appeal out of time. The day’s sitting was then devoted to the issue whether the appeal ought to be dismissed or whether leave should then be granted to the appellant to file for

an extension of time. He noted that he was required to spend hours preparing and submitting his legal submissions for the day's sitting.

- [18] Mr. Hinkson sought costs in the amount of \$2,500.00 together with VAT in the amount of \$437.50 for a total award of \$2,937.50. Mr. Gollop QC had opposed the application for costs indicating that the matter was not of longstanding and that it was a novel point of law. He stated that there had been no formal application to strike out the appeal.

Discussion

- [19] **CPR Part 65.2(1)** provides that where the Court has discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the Court deems reasonable were the work carried out by an attorney of reasonable competence. We find that an amount of \$1,500.00, together with VAT, would be reasonable in the circumstances for the day's sitting.
- [20] We further note that, in the final event, the respondent was successful in its contention that this Court lacked jurisdiction to extend the appellant's seven-day time period for filing leave to appeal. For this the respondent is also entitled to costs. We find in the circumstances that costs in the sum of \$2,500 together with VAT would be reasonable.

Disposal

[21] The application seeking an extension of the time to file a notice of appeal is dismissed and the notice of appeal is struck out.

[22] The appellant shall pay costs to the respondent in the total sum of \$4,000.00 together with VAT thereon to be paid on or before 15 December 2017.

Chief Justice

Justice of Appeal

Justice of Appeal