

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 5 of 2021

BETWEEN:

GRAHAM BETHELL

Appellant

AND

ROYAL BANK OF CANADA (BARBADOS) LTD.

Respondent

**Before: The Hon. Justice Rajendra Narine, The Hon. Justice Francis Belle
and The Hon. Justice Jefferson Cumberbatch, Justices of Appeal**

2022: February 22

2023: February 16

Mr. Bryan Weekes, Attorney-at-Law for the Applicant/Intended Appellant

**Mr. Garth Patterson QC in association with Mr. Bartlett Morgan, Attorneys-
at-Law for the Respondent/Intended Respondent**

DECISION

CUMBERBATCH JA:

INTRODUCTION

[1] The instant application seeks the leave of this Court to extend the time required to file and serve a notice of appeal against the 7 August 2020 order of **Griffith J.** By that order, the learned judge granted summary judgment to

the Intended Respondent, then Claimant, on the basis that the then Respondent now Applicant Intended Appellant (henceforth Intended Appellant) had no real prospect of success in defending the claim against him nor of maintaining his counterclaim.

- [2] On 10 August 2020 the Intended Appellant applied to us for leave to appeal the first part of that decision; an application that this Court ruled was unnecessary in a unanimous judgment delivered on 29 July 2021, since he had been granted unconditional leave to defend by the court below.
- [3] On 19 August 2021, the Intended Appellant filed this application, erroneously mis-described as one for “leave to appeal out of time” but, strictly stated in law, one for “leave from us to extend the time required to file a notice of appeal against the 7 August 2020 orders of the learned trial judge. We, nevertheless, agreed to treat the application as the latter.
- [4] In his application, counsel proffered no fewer than twelve substantive grounds of appeal covering *inter alia*, the failure of **Griffith J** to notice that the incorrect stamp duty was affixed of (sic) the Deed of guarantee upon which the Intended Respondent’s claim was based; the deed being stamped with a \$50 adhesive stamp when it should have been stamped to a value of \$2 000.00 pursuant to the Schedule to the **Stamp Duty Act**; her holding that none of the defences raised by the Intended Appellant had a realistic

prospect of success without the benefit of hearing and seeing witnesses in relation to the circumstances surrounding the execution of the Deed of Guarantee upon which the entire claim of the Intended Respondent was premised; her failure to appreciate that the grounds on which the Intended Respondent's application for summary judgment/striking out were based had not been established on the pleadings or by the state of evidence before the court; and her error in placing undue weight on the state of the particularization of the facts pleaded in the Amended Defence and Counterclaim upon which the Intended Appellant had relied to establish the defence of *non est factum*, as no request was made by the Intended Respondent for further and better information in relation to this defence, the Intended Appellant having pleaded that he mistakenly thought that he was signing a different document from the one he actually signed.

- [5] Of course, these grounds, voluminous as they are, do not immediately engage our attention, save to the extent that they are pertinent in the regulatory context of the **Civil Procedure Rules 2008** relating to the constraints of time in which to file notices of appeal and our permitted discretion to depart from those rules.

THE REGULATORY MATRIX

[6] In the determination of the application now before us, this Court considered that it should be guided by the provisions of the **Supreme Court (Civil Proceedings) Rules 2008 [CPR]** and the related jurisprudence that has emerged from their treatment in this jurisdiction over time.

[7] According to **CPR 62. 2(1)**:

“Where an appeal may be brought only with the leave of the court below or the Court of Appeal, a party wishing to appeal must apply for leave within 21 days of the order against which leave to appeal is sought.”

[8] **CPR 62. 1(2)** expressly permits the court to “*direct a departure*” from this rule:

“Without limiting its powers conferred otherwise, the court may direct a departure from this Part whenever that is required in the interests of justice”

[9] Mr. Patterson QC for the Intended Respondent makes the point in his written submissions that there is no application before the Court for time to be extended in which to file the appeal and that the present application should therefore be dismissed.

[10] And he submits further that even if we construed this application as one for an extension of time under **CPR 62. 1 (2)**, as we indeed have, there is nothing in it that discloses that its grant is required in the interests of justice.

THE INTERESTS OF JUSTICE

[11] In this jurisdiction, what may be generally regarded as the *locus classicus* of the elements of the interests of justice in the present context are the dicta of **Burgess JA** (as he then was) in **CGI Consumers Guarantee Insurance Co. Ltd. v Trident Insurance Co. Ltd., Civil Application No. 9 of 2014**, where, writing for a unanimous Court of Appeal panel, he stated:

“...assistance may be garnered from both pre-CPR and post-CPR authorities as to the explicit factors to which this Court should have regard. These factors include things such as the conduct of the parties in helping the Court to further the overriding objective of [the] CPR, as required by rule 1.3, the length of the delay, the explanation for the length of such delay, the chances of success on appeal and any prejudice to either party which might result from the grant or refusal of leave. We hasten to emphasize by repeating that these factors must be considered in the overall context of the case in question and that no one factor can be determinative.”

[12] For his part, Mr. Weekes appears to base his current application on both **CPR 62. 1(2)** and **CPR 62. 6(3)**. He states at paragraphs 9 and 10 of his written application:

“This matter raises important matters of law in relation to the application of the provisions of the Stamp Duty Act to the admissibility of documents in civil litigation. Mr. Bethell asserts in his appeal that the Deed of Guarantee is insufficiently stamped for the purposes of the Stamp Duty Act and is not admissible in evidence”.

It is for this reason; inter alia, that Parts 62. 6(3) and 62. 1(2) are satisfied.

[13] **CPR 62.6(3)** to which Mr. Weekes refers in his application, also empowers the court to extend otherwise mandated periods in relation to certain appeals.

It is useful here to set out the entirety of **CPR 62.6**:

- (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.*
- (2) *Any of the times stated in sub-rule (1) may be extended by the court or a judge (the judge, if minded to refuse shall, or for any other reason may, refer the question to the court) pursuant to an application upon notice filed within the relevant time.*
- (3) *Notwithstanding anything in this rule, the court or a judge (the judge, if minded to refuse shall, or for any other reason, may refer the question to the court) **may at any time for special reasons give leave to file and serve a notice of appeal (Emphasis added).**”*

[14] It bears reminder that the **CPR** do not define these “special reasons”, although there is some jurisprudence from this Court as to what considerations may be included in the concept.

SPECIAL REASONS

- [15] These considerations may be elicited from the decision in **Ifill v Attorney General of Barbados et al [2014] 85 WIR 81** where **Burgess JA** (as he then was), again writing for a unanimous panel, lucidly analyzed the relevant factors that make up “special reasons”.
- [16] In **Ifill**, notice of an application for leave to extend the time for filing notice of appeal against the lower court decision of **Richards J** delivered on 1 December 2010, was not filed by counsel for the Intended Appellant until 24 April 2013.
- [17] In his written judgment, **Burgess JA** first noted the injunction in **CPR 1.1(2)** that the Court should, when interpreting or exercising any powers under the rules, seek to give effect to the overriding objective of the **CPR**.
- [18] This objective was to be found in **CPR1. 1 (1)** and was “to deal with cases justly”. This precept was further refined in **CPR 1.1 (2)** and included “ensuring that the parties are on an equal footing, saving expense, dealing with cases in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of issues, and the financial position of each party, ensuring that a case is dealt with expeditiously and fairly, and allotting to the case an appropriate share of the court’s resources,

while taking into account the need to allot resources to other cases”. He summarized these as follows:

“...the establishment of procedural rules which ensure the just, speedy and inexpensive determination of the substantive issue in every proceeding”.

[19] As to the constitution of “special reasons”, the judgment noted that the **CPR** itself had refrained from offering a definition, and the court should act similarly to avoid rigidity. In the view of the Court:

“...the special reasons requirement in Part 62, Rule 6 (3) should be understood and applied against the backdrop of the overarching purpose of the time limit rules introduced by Part 62.6. This purpose is to replace the mischief of the laissez-faire approach to time limits for appealing encouraged by the pre-CPR civil procedure regime by a new litigation culture of compliance with the time stipulations in Part 62.6. Non-compliance with those time limits, we would add, can operate to defeat the objective of dealing with cases justly mandated in CPR 1.

Viewing ‘special reasons’ through the prism of the mischief with which Part 62 Rule 6 was introduced to deal leads inevitably to a presumption in every case that adherence to the time limits specified in Rule 6 (1) and Rule 6 (2) is the rule and that rebuttal of that presumption in Rule 6 (3) is the exception. A necessary indication of this is that Rule 6 (3) “special reasons” must be construed strictly as only being satisfied where the value of the substantive issue in question outweighs the speedy and inexpensive determination envisaged in Rule 62 (1) and Rule 62 (2).

The upshot of the foregoing is that the only reasons that can amount to ‘special reasons’ are those which relate to the considerations listed in Part 1 Rule 1.2. So, as an example, and we offer examples with trepidation, ‘special reasons’ may be

found under Part 1 Rule 1(2)[c] [iii] where we consider the issue should, in the public interest, be examined by this court or where clarification of the law is required . Another example where ‘special reasons’ may be shown is under Part 1 Rule 1 (2) (b), that is, if the grant of an extension would have the effect of saving expense”.

[20] The Court of Appeal in **Ifill** also sought to exclude certain elements from the category of ‘special reasons’. These were the length of the delay in bringing the application on the basis that it was an “immaterial consideration”; and that there was “no such express limitation in **Rule 6 (3)**”- (**para. 35**) and the merits of the appeal which were “not in immediate issue” – (**para.37**).

[21] In the event, the Court isolated two special reasons on the facts of that case. These were, first, **the importance of the case** - as the intended appeal concerned a matter of general public importance, namely, the proper application of a constitutional provision dealing with the removal from office and the disciplinary control of public officers by the Governor-General; and thus raised an issue of the vindication of constitutional rights beyond those of the Intended Appellant to all public officers in Barbados, in a context where, according to a regional text, there was little or no Commonwealth Caribbean case law on interpreting similar constitutional provisions.

[22] The second was that the decision in the intended appeal had the potential of saving expense in that an interpretation of the provision by the Court “will

undoubtedly guide public servants and their lawyers in deciding whether or not to pursue a case under that section and so reduce costs in the application of the **section**.”

[23] While we do not differ diametrically from our learned brothers in **Ifill**; indeed, we commend the cogency and eloquence of their decision, we should nevertheless wish to sound a few words of caution for the future treatment of that decision in this jurisdiction.

[24] For one, we do not believe that the judgment was intended to be read as one would read a statute, so that counsel should not in future attempt to ‘shoehorn’ facts into those categories that found favour as special reasons in that case. Second, and this is not an unrelated point, we do not believe that the category of special reasons are closed except for the vindication of a constitutional right or the issue being one of public importance or one requiring appellate clarification.

[25] More simply put, while we acknowledge the persuasive force of what were held to be special reasons in **Ifill**, we do not close the door to, for example, a general *force majeure* situation such as a national lockdown or widespread natural disaster constituting a special reason for directing a departure from the specified time limits.

DISCUSSION

[26] Both of the appeals intended on behalf of Mr. Bethell by Mr. Weekes, that against the issuance of summary judgment in favour of the Intended Respondent and that against the dismissal of Mr. Bethell's counterclaim require us on his application to direct a departure from the otherwise directly applicable rule in **CPR**.

(a) Appeal against the order dismissing the counterclaim

[27] **Section 54 (1)** of the **Supreme Court of Judicature Act, Cap. 117A** provides that "No appeal lies to this Court (a) without the leave of the judge or of the Court of Appeal, from an interlocutory order or judgment made or given by a judge of the High Court except in the following cases, namely..." [thereafter follow **subsections (i) to (vii)**, none of which is immediately relevant here].

[28] Since the order dismissing the counterclaim is to be regarded as an interlocutory judgment, an intended appellant therefore requires the appropriate leave to file a notice of appeal. However, as **CPR 62.2 (1)** states:

"Where an appeal may be brought only with the leave of the court below or the Court of Appeal a party wishing to appeal must apply for leave within 21 days of the order from which leave to appeal is sought."

[29] There is no dispute here that many more than 21 days have elapsed since the issuance of the order dismissing the counterclaim by the learned trial judge. Hence the need for Mr. Weekes to pray in aid **CPR 62, Rule 1(2)** that permits us to direct a departure from **CPR 62.2 (1)** in the interests of justice. We have outlined above at paragraph 11 the factors comprising the interests of justice in this jurisdiction.

[30] Perhaps owing to his initial misperception as to the precise nature of his application to this Court, a reality to which we alluded earlier, Mr. Weekes did not systematically refer us to the several relevant factors identified by this Court in **CGI Consumers Guarantee Insurance Co. Ltd. v Trident Insurance Co. Ltd. *supra*** that would induce us to direct a departure from **CPR 62. 1(2)**. For instance, he did not in his oral or written submissions refer us to the extent to which he had assisted the court in furthering the overriding objective of the **CPR** nor did he advert directly to the prejudice that might be caused to the intended appellant were we to deny the application.

[31] Mr. Weekes concentrated his efforts rather, on establishing that the intended appeal had a realistic prospect of success, principally on the ground that the Deed of Guarantee was insufficiently stamped and thus inadmissible into evidence in the court below.

[32] Mr. Weekes bases this assertion on **section 34 (1) and (4)** of the **Stamp Duty Act**.

[33] **Section 34 (1)** provides:

“Upon the production of an instrument, chargeable with any duty, as evidence in any court of civil jurisdiction in Barbados or before an arbitrator or referee, notice shall be taken by the judge, arbitrator or referee or any mission [sc. of any omission] or insufficiency of the stamp thereon, and if the instrument is one which may be legally stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument or to the arbitrator or referee, of the amount of the unpaid duty and of the penalty payable on stamping the same and of a further sum of \$100, be received in evidence, saving all just exceptions on other grounds.”

[34] And **section 34 (4)** states:

“Save as aforesaid, an instrument executed in Barbados, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in Barbados, shall not except in criminal proceedings, be given in evidence, or be available for any purpose whatsoever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.”

[35] From an analysis of these two provisions, it appears that an insufficiently stamped document will be inadmissible in evidence under **section 34 (4)** only if it is not saved by **section 34 (1)**, given the introductory words of the former **subsection**.

[36] Mr. Weekes submits that in this context the critical issues for us to determine are whether the guarantee relied on upon by the Intended

Respondent was correctly stamped within the provisions of the **Stamp Duty Act** and second, if it was not, what should be the legal consequence.

[37] It bears repetition that this matter was not raised at any stage in the court below. Mindful of this, no doubt, Mr. Weekes contends that we should be guided by the Court of Appeal decision in **Routledge v McKay, Nugent and ors. [1954] 1WLR 615** where *Evershed MR* stated:

“...it is the duty of the Court of Appeal to pay regard to what Parliament provides in section 14 of the Stamp Act 1891. The court cannot assume that there has been some decision by the court below merely because in the court below the document has been accepted into evidence.”

[38] And he submitted that we are hence duty bound to ensure that the law laid down by the Parliament of Barbados at **section 34**, is complied with, even if the court below has failed to do so.

[39] The immediate difficulty with this submission, of course, is that the issue never arose for consideration in the court below and nothing has been presented to us to demonstrate that the Master of the rolls intended by his dicta to bypass well-established principles of appellate practice.

[40] Mr. Weekes also prayed in aid of his submission that the deed of guarantee here should have been stamped to the sum of \$2000.00, the *House of Lords* decision in ***Inland Revenue Commissioners v Ansbacher [1963] AC 191*** where *Lord Morris of Borth-y-Gest* classified a deed of guarantee under the

heading Mortgages, Bonds Covenants. The equivalent classification is provided in the Barbados Act.

[41] Since it was not so stamped, counsel reasoned, it should be regarded as an insufficiently stamped document. Nor he submits, is this insufficiency cured by **section 34 (1)** since, as a matter of construction of the **SDA**, it was not an instrument which had to be assessed by the Registrar pursuant to **section 31 (1)** and therefore was not one of the instruments that could be stamped after execution.

[42] As attractive as counsel's argument might appear on its face, we are not persuaded that it is one best made before a tribunal such as ours. Foremost, we will not have access to the deed of guarantee in issue to examine it for compliance with the required stamp duty. Second, as a court of review, the central issue for us is whether the determination of the learned trial judge to dismiss the intended appellant's counterclaim was impeachable. Third, Mr. Weekes has not sought the leave of this Court to adduce fresh evidence in the form of the illegally under-stamped guarantee.

[43] In any event, his argument appears to be a thinly-veiled attempt to introduce a new point on appeal, and, at the same time, to supply new evidence not advanced in the court below, both impermissible strategies of appellate litigation.

[44] As to the first, we refer to the dicta of *Lady Justice Hale* in **Hertfordshire Investments Ltd. v. Bubb** [2000]1 WLR 2318, 2334:

“It is in the interests of every litigant and the system that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.”

See also *Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th ed.); para. 25.237 and *Lord Justice Maurice Kay et al, eds., Blackstone’s Civil Practice 2011* (OUP).

[45] As far as the second is concerned, the rule in **Ladd v Marshall** [1954]1WLR 1489 is instructive. According to this, an appeal court will only consider new evidence in very limited circumstances, principally where an applicant is able to show that he could not have with reasonable diligence obtained the evidence for use at the trial. No such claim has been made here.

[46] On the other hand, Mr. Garth Patterson QC, for the Intended Respondent, approached more frontally the issue of “the interests of justice” that would warrant our direction of a departure from the time period in **CPR 62. 2 (1)**.

[47] He submitted that Mr. Weekes had failed to assist the Court in furthering the overriding objective of the **CPR**, first, by refusing to heed the advice of opposing counsel that there was no need to apply to this Court for leave to appeal the issuance of summary judgment against his client by **Griffith J**, as

was confirmed by this panel in its judgment of 29 July 2021. He further advanced that second, over one year later, counsel for the appellant had now filed an appeal against the dismissal of his counterclaim, while omitting to apply to us for leave to file a notice of appeal out of time.

[48] Moreover, his sole excuse for the delay was his own default, a reason that has not found favour with the courts. In support of this proposition, counsel referred us to **Ruby Mitchell and Owen Mitchell v John Wilson CCJ Appeal No. GYCV2017/001** at para. 6; and **Sigma Construction Inc. v. Birch Development Ltd. Civil Application No. 16 of 2016** (*Counsel's error as to the necessity for seeking leave to appeal not to be considered a good reason for delay*).

[49] In any event, Mr. Patterson QC submitted finally, the gravamen of Mr. Bethell's claim here is that the learned judge's dismissal of his counterclaim was in error. In the view of Mr. Patterson QC, this was simply an exercise of her discretion and, according to recognized authority, beyond the review of this Court unless it is shown that the judge either erred in principle in her approach or left out of account, or took into account, some feature that she should have, or should not have considered or that her decision was wholly wrong because the Court is forced to the conclusion that she has not balanced the various factors fairly in the scale - **Toojays Ltd**

v West Haven Ltd. [Civil Appeal No. 14 of 2008] Counsel also relied on **Aaron Truss v Windsor Plaza Ltd. [Civil Application No. 10 of 2015]**; and **Phonographic Performance Ltd. v AEI Rediffusion Music Aaron Ltd. [1999] 1 WLR 1507, 1523D** *per Lord Denning*.

[50] We find much merit in these submissions. Moreover, we are not persuaded by the argument of Mr. Weekes that because the defence of *non est factum* has been successfully established by parties who are not suffering from disabilities that an identical benefit should have been accorded to the applicant here. Mr. Weekes relied on the decision of **Friends First Finance Ltd. v. Lavelle and anor 2013] IEHC 201**. However, our close reading of this decision finds it patently distinguishable from the case at bar.

[51] In that case, Mrs. Lavelle, described as quite intelligent and literate, signed loan documents at the insistence of her husband who had misrepresented to her the nature and quality of those documents. The financial company had had no direct contact with Mrs. Lavelle. She successfully raised the defence of *non est factum*.

[52] We are of the view that the decision there was significantly influenced by the clear presence of the undue influence of the husband over the wife, a factor that has no parallel here. As *Charlton J* stated in that case:

“She said that she was given documents by her husband and that these were presented in the context of the family trust and

the documents already signed by her in that regard and that she trusted him that he was doing this for her family **as he was then in charge.**” (Emphasis added)

[53] And he concluded, “In the context of the entirety of the evidence, my assessment of the reliability of all the witnesses and my view of the character of Charlotte Lavelle, the defence that the loan agreement is not her deed is clearly made out.”

[54] This finding is distinctly remote from the factual circumstances here. We hold therefore that there has been nothing adduced by the Intended Appellant that would compel us in the interests of justice to direct a departure from the relevant **CPR** stipulation and we therefore dismiss the present application for leave to extend the time to file a notice of appeal against the decision of the learned trial judge to dismiss the counterclaim of the Intended Appellant.

(b)The Intended Appeal against the order for summary judgment

[55] Since, as we had ruled on 29 July 2021, there was no need for the Intended Appellant to seek our leave to appeal this determination by the learned judge, **CPR 62.6 1(c)** mandates a limitation period of 28 days from the date of the order or judgment for the filing of a notice of appeal. It is beyond dispute that this period has long elapsed but, notwithstanding this, **CPR 62.6**

(3) as stated above, permits us, “*at any time for special reasons to give leave for the filing or the service of a notice of appeal*”.

[56] The Intended Appellant must therefore persuade us that there exist special reasons that should oblige us to grant the applicant leave to file and serve a notice of appeal even at this stage.

[57] In this regard, Mr. Weekes sought to press upon the Court that the resolution of the identical issue of law he had identified earlier as affording him a realistic prospect of success in the interests of justice criteria constitutes a sufficiently special reason to warrant a departure from the applicable rule. We disagree.

[58] Although we would reaffirm our earlier theses that the category of special reasons is not closed and that this should not be limited solely to those identified in **Ifill** (*loc. cit. supra*), we should still ensure that the reason or reasons advanced for us to exercise our discretion under **CPR 62.6(3)** “is or are indeed special” and not simply banal, ordinary or mundane.

[59] Hence, when the reason argued as special is the determination of a point of law, as is the case here, it should be an issue that demands the deliberation of the scarce resources of this Court, given that our agreement that it is indeed a special reason has the immediate consequence that the appeal process

continues despite its earlier failure to comply with the prescribed time limitations.

[60] The question that begs current asking is whether a determination of the circumstances in which stamp duty is payable to the Revenue, the amount of such payment and the consequences of its non-payment are issues which demand the judicious use of the resources of this Court?

[61] Given the relatively widespread general knowledge of the public obligation to comply with stamp duty requirements and the fact that the relevant statutory provisions do not involve any especial difficulty of interpretation, we do not consider that these reasons may be classified as special under the rule.

DISPOSITION

[62] The application by Mr. Bethell for an extension of time to file a notice of appeal against the learned judge's denial of his Counterclaim in the court below is dismissed, as not being in the interests of justice. We also dismiss his Notice of Appeal against the issuance of summary judgment in favour of the Respondent for having being filed out of time, according to the provisions of the **CPR**, there being no special reason to permit it delay introduction.

[63] Costs are awarded to the Intended Respondent; such costs to be agreed or, failing agreement, to be assessed.

Justice of Appeal

Justice of Appeal

Justice of Appeal