COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 14/77

BEFORE:
THE HON. MR. JUSTICE ROBINSON P.
THE HON. MR. JUSTICE ROBOTHAM J.A.
THE HON. MR. JUSTICE CARBERRY J.A.

MELBOURNE WALTERS

v

OMEGA BAY ESTATES LTD.

Mr. Horace Edwards Q.C. instructed by
Mr. G. MacMillan appeared for the Plaintiffs/Appellants
Mr. Frank Barrow (Truman Bodden & Co.) appeared for the Defendant/Respondent

July 18, 19, 1978

CARBERRY J.A.

This is an application made under the Land Adjudication Law, Law 20 of 1971, for leave to appeal out of time under section 23, sub-sectional of that Law.

The Land Adjudication Law, as set out in the memorandum of objects and reasons for the law, is a law designed to pave the way for the establishment of a modern system of land registration. The law provides for the demarcation and survey of the boundaries of land held in the island, and in the case of disputes as to boundaries or ownership for such disputes to be settled by a land tribunal; and in this tribunal an adjudicator who sits with two assessors ~~constitutes~~ the tribunal.

Now, in the case before us, it appears that the various preliminaries were gone through. An area of land was to be adjudicated on and in due course various owners of land or claimants to land in that area appeared before the adjudicator. Among those claimants was the respondent in this appeal, Omega Bay Estates Ltd., and the appellants Melbourne Walter et al. It appears that the usual preliminaries went through, the adjudicator heard both parties and it appears also, that the appellants in this case took steps to institute a petition

which, in effect, asked the adjudicator to re-hear the evidence concerning their claim; it appears that there is disputed land which falls between what the applicants or appellants claims is theirs and what the respondent claims is theirs. It appears that this petition was duly heard and the adjudicator, apparently, saw no reason for altering the decision that he had previously made; and on the 18th of March, 1975 he announced his decision. We gather that the necessary certificate was issued on the 19th of March, 1975.

Under section 23, sub-section 1 of the Land Adjudication Law, any person who is aggrieved by any act or decision of the adjudicator and desires to question it or any part of it on the ground that it is erroneous in point of law or on the ground of failure to comply with any procedural requirement of this law, may appeal to the court within 30 days of the certificate of the adjudicator given under section 22. The operative day was the 19th of March, 1975, and the appeal which the appellant hoped to pursue should have been filed within 30 days of that date, that is to say, it should have been filed on or before the 18th of April, 1975.

The attorneys for the appellants, there are two of them, have both filed individual affidavits explaining what happened in this matter and it is sufficient to say that one of the attorneys left the Cayman Islands and was out of the island and that the other, his partner, got ill. There is an affidavit with a statement that the gentleman who got ill had ordered or directed his secretary to file the grounds of appeal and the notice of appeal, but that the secretary neglected to do so. He did not discover this until the 5th of May, when he was sufficiently well to resume work in his office; he then found that the papers had not been filed, and he filed them on the 5th of May, 1975. On that date he was at least 17 days late. What he ought then to have done was to have made an application to the court, that is the Grand Court, for leave to appeal out of time.

Section 23 (1), (we have looked at the earlier part), provides that the appeal should be within 30 days, "or within such extended time as the court may, on good cause being shown, allow". There was at that time no effort made to show good cause, the appellant's attorney was content to file the notice late and, presumably, to hope that the delay would not be noticed. In this he was correct, it was not noticed, and the appeal came on to be heard on the 3rd of September, 1975; that apparently was the return day. It was set down in the normal course of business, and the actual hearing of the appeal should have commenced on the 17th of November, 1975. On that day, for some unexplained reason, the appellants' attorney apparently was not ready, and the clients arranged with Messrs. Maples & Calder to make an application for an adjournment. The application was made but refused, whereupon Merrs. Maples & Calder filed an appeal against the refusal for the adjournment. Be it observed that even up to that time, apparently no one had noticed that the original appeal was out of time.

The appeal against the application for adjournment came up to be heard on or about the 7th of January, 1976; no one appeared for the appellants at those proceedings and with remarkable charity those proceedings were apparently stood over at which time the respondent took out a summons to dismiss the appeal, that is the appeal against the refusal of the adjournment, and that was set down to be heard on the 1st of April, 1976. It then occurred to them, the respondents, that they could go a little further, they could ask for the substantive appeal to be dismissed for want of prosecution, and apparently, on the 16th of March, they took out a second application to dismiss the substantive appeal for want of prosecution. They were content to speak in terms of generalities and no particular reason was disclosed other than the obvious one that this appeal should have been started from November and it was now several months later and nothing had happened. But it appears that either the pricking of conscience or an acquired

alertness to a sense of danger made the appellants look again at their papers. They discovered that they were out of time originally and they then decided to apply to the court for leave to make their appeal out of time. That they did by a summons dated the 15th of April, 1976, and all three summons,, apparently that is to say the summons to dismiss the appeal asking for adjournment, the summons to dismiss the substantive appeal for want of prosecution and the application to file the appeal out of time came on to be heard before the Grand Court. There was a hearing which covered two days and the appellants were represented by Mr. Horace Edwards and Mr. G. MacMillan. Mr. Truman Bodden appeared for the respondents, Omega Bay Estates Ltd.

Most of the time appeared to have been spent on the application for leave to extend the time within which the appeal should be filed or lodged. There is no allegation by the respondents in this matter that they did not know that an appeal was contemplated and as far as we know, they were served with copies of the appeal, because no such point has been taken and in that sense they have not been prejudiced in any way by the delay in lodging the appeal. The application for extension of time to appeal was refused. Verbal notice was given against that refusal and it is with that application and that refusal that we are dealing today.

There has been a very elaborate argument which again has lasted over two days before us, as to whether leave to appeal out of time should be given in this matter. A great many cases have been cited to us dealing with the extension of time for appealing. Fortunately or unfortunately most of those cases deal with the normal litigation between party and party and none of them, as far as I know, deal with thetype of circumstance that we have with regard to the Land Adjudication Law. I mention that because one of the matters which has influenced us most strongly in reaching the decision that we have reached is the nature and intent of this particular bit of legislation. It is intended to be the foundation for setting up a

comprehensive system of registration of titles in an area of a small island in which possibly before the advent of tourism not a great deal of attention was paid to land and who owned it and so forth; and the intent of the law was to try and settle boundaries, settle ownership and various rights in the land on a once and for all basis so that the island as a whole would go forward from that point with the benefits which a registration of titles system can bring.

The legislators went out of their way to provide, in effect, that persons affected by the law would have, first of all, not only the right to appear before the Adjudicator and be heard, but even a right of asking him to reconsider his decision again by petition, and on top of that a right to appeal to the court and to have their day in court in which they could question the decision of the Adjudicator as to their respective rights, although it is to be observed that this was limited to questions as to points of law or whether there had been procedural breaches of the requirements of that law. The law itself lays down a period of 30 days for appeal to the Court but gave the Court an untrammelled discretion to extend the time on good cause being shown. It appears to us that when we consider what 'good cause being shown' means, it covers the following points:-

(a) There must be some reason given as to why the appellant was late in the filing of his appeal.

(b) It seems to us that the appellant must be able to show that his appeal is not fanciful or spurious, but that there is some arguable point involved. We do not go into the question as to whether he has something prima facie arguable and because of the - to use the colloquial expression 'one shot' nature of this exercise, it does appear to us that persons should not be shut out forever and ever by a technical application of the traditional

rules governing appeals and the rules governing extension of time for filing appeals.

Mr. Edwards referred us to a great many cases dealing with this matter, and it may be useful if I mention some of them so that it might be known that they were mentioned before us and considered. He referred us to Evans v. Bartlam, (1937), 2 A.E.R. 646. This case is not strictly a case governing a question of extension of time for appeal, it is a case dealing with setting aside a default judgment, but in it are helpful passages dealing with the approach which the court takes to breaches of procedural rules which the court has laid down.

He next referred us to a case of Forbes v. Bonnick, R.M.C.A. 20/1968, a decision of this Court of Appeal of the 29th of July, 1968, which apparently has not yet reached the law reports. That case was concerned with the extension of time to appeal and shows that the court was concerned to know whether the respondent was aware that there was a serious continuing intent to prosecute the appeal. In this case, seeing that the respondent prepared for trial of the appeal in November, there is no doubt that they were aware that there was a serious continuing intent to prosecute the appeal. The case also says that there must be a reasonable excuse for filing the grounds late and that the appellant should show an arguable case in which there is some probability of success, it does not have to reach any greater standard than that, some likelihood of success, some merit. Mr. Edwards spent a good deal of time before us on this point and advised us so because the original grounds of appeal which he filed late are very, very scanty, but he was concerned to show that in making his decision the Adjudicator had drawn wrong inferences; Mr. Edwards said that there was substantial evidence of long possession which the Adjudicator had ignored and that he had drawn wrong inferences from ancient documents of titles to be interpreted that raised grave doubts of ownership and that he misinterpreted them. Mr. Edwards also relied on the case of British Launderers' Research Association v. Central Middlesex Assessment Committee & Hendon Rating Authority, (1949) 1 A.E.R.21 Lord Denning, at

pages 25 and 26 deals with the question of when do we pass from the field of evidence into the field in which we can say there has been an error of Law.

We have considered the point extensively and we think in this case there are shown to be possible errors in point of law as required by section 23 (1) of the Land Adjudication Law.

As against that, Mr. Barrow has argued two points; first of all, that the traditional cases show that recently the courts have become increasingly intolerant of the ineptitude of attorneys praticing before them and it is no longer as charitable as formerly. He referred us to Gatti v Shoosmith (1939), 3 A.E.R. 916 and cases such as cases as Ratnam v Cumarasamy (1964), 3 A.E.R. 933, in Jamaica in particular to City Printery v Gleaner Co. (1968), 13 W.I.R. 126.

It is perhaps, worth spending just a little bit of time on the latter case. In this case, what was at issue was the failure of the appellant's attorney at law to complete the record and he failed to complete the record for a period of over two years and when asked why or when he asked for leave to complete the record out of time, he advanced the proposition that he had moved office, that he had had a frequent change of secretary and that he had had certain dislocations in his office routine in this period.

Well in that respect, it is a much worse case that this one is. In this particular case that we have before us, there was reasonable excuse for the appeal being late in the first place. What had caused us a great deal of difficulty, and I may say that before Mr. Edwards commenced his address we were influenced very strongly against his client by it, was the fact that between the time that they filed the appeal, slipped it in underneath the door so to speak in May, they did nothing to regularize the position and to ask for leave to appeal out of time until the 15th of April, 1976, so that for the best part of nine months, having filed his appeal late, they were hoping that it would pass un-

noticed. Mr. Edwards has asked us to be more charitable and to draw the inference that the attorney in question was very old and infirm, and that it was not appreciated (and indeed the lack of appreciation seemed to have been on both sides), it was not appreciated until very late in the day that the original notice of appeal was, in any event, out of time.

Well, the second point that Mr. Barrow has taken, and indeed in the way he developed the argument it was a most interesting one; he says that under section 23, sub-section 3, persons who are aggrieved by an order of decision of the court in these matters "may appeal to the Court or Appeal in accordance with the provisions of the Judicature (Administration of Justice) law governing appeals in Civil Proceedings, (but restricted to the matters stated in sub-section (1))". Those last words are in brackets and Mr. Barrow stresses them and he draws therefrom the inference that the legislature intended that the appeals that come to the Court of Appeal from the Grand Court in matters under the Land Adjudication law should be of the same nature as those that went to the Grand Court in the first place, namely, should be errors in law and breaches of procedural requirements regarding the settling of boundaries and so forth.

He then drew the further inference from that that there is no appeal against the refusal of the Grand Court to give leave to appeal out of time. We think that it is a very attractive argument but we are not persuaded by it. It appears to us that a refusal to extend the time for appealing can in certain circumstances constitute an error of law if the refusal is given on wrong principles or obvious principles are not applied in dealing with the application. We regret that we are not greatly assisted by the judgment of the Grand Court in understanding why the appeal was refused in this case and what principles were operative, because the judgment consists of two words, 'Application refused'. Without that assistance we feel inevitably driven to the conclusion that this was an error of law and

that the learned judge, with great respect, failed to appreciate the intent and purpose of the Land Adjudication Law.

We do not regard this tolerance that we propose to extend to the applicants as forming any general license for practitioners to put in their appeals out of time. This is a decision limited purely to this particular law which, as I have said, is a 'one shot' exercise, falling somewhat out of the normal rules of litigation and be it observed that we are strengthened in this view that every person affected by the law ought to have his day in court because the Adjudicator and the Record Officer under this law, in the exercise of their powers are given by section 16, subsection (4) the power in their absolute discretion to admit evidence which would not be admissible in a court of law. They may use evidence adduced in any other claim or contained in any official record, they may call evidence on their own motion; all of these are things which the normal court cannot do and it does seem to us that in these circumstances an applicant ought to have the opportunity of testing their respective claims before the court of law and that when the learned judge of the Grand Court is considering whether there should be extended time given, that these are factors which should enter into his deliberations. So, for that reason, we make the order which we feel the Grand Court ought to have made in this case and that is to extend the time for appealing so that the appeal that was lodged on the 5th of May, 1975, will be deemed to have been lodged within the time for appealing as extended.

The original grounds of appeal were, as we have remarked earlier, very scanty, though from the argument before us more substantial matters have been canvassed. It would have been wiser if the appellants had in their original grounds asked for leave to file supplemental grounds when the notes of evidence were available.

We propose that they have leave to file supplemental grounds of appeal but within the period of 30 days as of today, and I

would like to advise them that that would have completely exhausted any charity this court or the Grand Court would be prepared to extend.

Now, as to the costs of this matter, this is also a matter that has given us some concern. Though we have come to the conclusion that the Grand Court ought to have given the extension of time for filing the appeal when it was asked to do so, even had it done so the respondent would have been entitled to costs in that court because what was in substance happening was that the appellants were coming in mercy, cap in hand, to ask for a dispensation to be granted to them. The respondents were entitled to oppose that and they would be entitled to their costs below in any event and we so order.

With regard to the costs of this appeal, it is true that the normal rule is that the successful litigant is normally entitled to costs, - that the costs follow the event, - it is true that the appellants have won and that they should have got this order made in the Grand Court, but we do not so order, in view of the fact that the whole of this situation has been brought about by their original errors. We are of the view that they should not get their cost in the Court of Appeal although they have succeeded, and we were at one time considering the question of whether we ought not to make an unusual order viz. that the unseccessful respondents should get their costs. Mr. Barrow, on behalf of the respondents has said that he is not asking for his costs here, so there will be no order as to the costs of the appeal, and the respondents will get their full costs in the Court below.

The appellants will enter into a bond for due prosecution of their case before the Grand Court in the sum of $800 C.I. for security for the costs of the respondents and they should enter into this bond within the 30 days that have been prescribed for them to file supplementary grounds of appeal, assuming they wish to do so. There will then be security for due prosecution of the

appeal in the sum of $50 and $800 for the security for costs.

The Order then will be:

Appeal allowed. Leave granted to appeal out of time. The Notice and Grounds of Appeal filed on the 5th May 1975 to be deemed to have been filed in time. Leave also granted to file supplemental Grounds of Appeal within 30 days of today's date.

Appellants to pay Respondent's costs of the hearing in the Court below, and appellants to enter into a bond of $800.00 as security for the costs of the appeal and a bond of $50.00 as security for the due prosecution of the appeal, both bonds to be executed within 30 days of today's date. No order as to the costs of the appeal.