

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: No. 017

BETWEEN:

TONI MARTIN

Appellant

-and-

LARRY ENGRISSEI

Respondent

Before: **Hon. Assistant Justice Rihiluoma**

Appearances: **Ms Sara Tucker, Trott and Duncan Limited, for the Appellant**
Mr Christopher Swan, Christopher E. Swan & Co, for the Respondent

Date of Hearing: **21 March 2019**

Date of Judgment: **05 April 2019**

RULING

Leave to appeal out of time – good and substantial reasons

INTRODUCTION

1. This matter comes before the Court on an appeal from Magistrates Court in respect of the Wor. Anderson's refusal to grant the Appellant leave to appeal out of time. The Appellant has brought a Motion in this Court for Leave To Appeal Out Of Time and he has filed a substantive Notice of Appeal.

BACKGROUND

2. The Appellant was the Respondent's landlord. On 11 September 2014 the Respondent brought proceedings against the Appellant by Ordinary Summons in the Magistrates' Court seeking damages in respect of the condition of the rented premises. On the first Return Date, 24 October 2014, the Appellant was represented by Mrs. Lauren Sadler-Best of Trott & Duncan who advised the Court that the matter was disputed. The Respondent was represented by Christopher Swan of Christopher E Swan & Co. The Appellant filed a Defence and Counterclaim on 17 February 2015.
3. After a couple of adjournments/mentions on 19 February 2016 the Magistrates' Court fixed a trial date for 9 June 2016 at hearing attended by Counsel for both parties.
4. On 9 June 2016 the Respondent (who was the Plaintiff in the Magistrate's Court) attended trial with his Attorney Mr Swan. Neither the Appellant nor anybody from Trott & Duncan attended the trial. In the Appellant's absence the Magistrate received evidence from the Respondent. The Magistrate found that the Respondent had proved his case and awarded him \$23,925 and costs ("the Judgment").
5. The Appellant says in his Affidavit, dated 9 February 2017, that he did not know of the 9 June 2016 trial date. The Appellant learned of the missed trial when he received a telephone call from Mr Swan's office advising the Appellant that judgment had been obtained against him. The Appellant contacted Trott & Duncan to find out what had happened. He learned that Mrs Sadler-Best who had been handling his file had left the firm. Beyond Ms Saddler-Best's departure from Trott & Duncan, the Appellant's Affidavit offers no explanation for the non-appearance at trial on 9 June 2016.
6. Ms Sara Ann Tucker took over the conduct of the Appellant's case at Trott & Duncan in seeking to deal with the Judgment. Ms Tucker said in submission that she was in difficulty because the Appellant's file had been lost.
7. Under section 4 of the Civil Appeals Act 1971 the Appellant had 30 days in which to file a Notice of Intention to Appeal from receipt of judgment. Mr Swan calculated this to be 23 July 2016. The filing of an Intention to Appeal preserves the Appellant's

right to appeal and begins the process of the Magistrates' Court producing a Record of Appeal. Once the Record of Appeal has been provided to an appellant he has 14 days in which to produce a Notice of Appeal.

8. By a letter from Trott & Duncan, dated 22 April 2016, to Magistrates' Court the Appellant requested "*a date for mention in order for our Application to Set Aside Judgement be heard*". It is common ground that Trott and Duncan letter could not have been dated 22 April 2016 as it pre-dates the Judgment. Trott and Duncan's letter to Magistrates' Court must have been before 17 August 2016 because that is when Ms Tucker emailed Magistrates' Court following up on a Notice of Hearing. There is no Application to Set Aside Judgment in the Record of Appeal or in the Court's file.
9. It is now common ground that an Application to Set Aside Judgment was not the proper procedure to attack/reverse the Judgment. The proper procedure as outlined above is for the Appellant to file a Notice of Intention to Appeal within 30 days of receipt of the judgment and a Notice of Appeal within 14 Days of receipt of the Record of Appeal.
10. In January 2017 the Appellant realised that the wrong procedure had been followed. On 6 January 2017 Trott & Duncan wrote to the Magistrates' Court to advise that they intended to appeal the judgement and requested the transcript of the trial or the Court Smart recording.
11. On 25 January 2017 the Senior Magistrate Ordered that the Appellant have leave to serve a Notice of intention to Appeal out of time and Leave to Appeal Out of Time within 14 days. The Senior Magistrate set the Application for Leave to Appeal Out of Time down for hearing on 17 February 2017. The Appellant filed his Notice of Intention to Appeal and Application or Leave to Appeal Out of Time on 31 January 2017. It seems inconsistent for the Senior Magistrate to order leave to file Notice of Intention to Appeal Out of Time and Leave to Appeal Out of Time. By reason of the fact that the Senior Magistrate fixed a date for the Leave to Appeal Time hearing, it is safe to assume that his grant of leave to file an Intention to Appeal out of Time was not intended to override the need to obtain leave to appeal out of time.

12. On 17 February 2017 Wor. Anderson heard the Appellant's Application for Leave to Appeal out of Time. Ms Tucker explained the failure of Mrs Sadler-Best to attend the hearing and difficulty in obtaining a transcript of the 9 June 2016 hearing as reasons for failing to appeal within the prescribed time. Mr Swan on behalf of the Respondent argued that the Appellant had failed to provide good reason for the 8 month delay in filing the Application for Leave to Appeal Out of Time. The Magistrate dismissed the Application and ruled:

“After reviewing the Court file; the court cannot see and the Defendant has not provided any good and substantial cause why there was such a substantial delay in filing any appeal documentation with this court

Further even if the Defendant met this first criteria under Rule 4 (2), the Defendant in his Affidavit does not indicate a prima facie cause as to why this Court should allow the appeal to be heard.”

THE LAW

13. Both parties rely on the Court of Appeal decision in *Holder v Hazel Holder and Ors.* [2015] Bda LR 54 as stating the law governing applications for leave to appeal out of time. Baker P ruled:

“The relevant rule provides as follows:

‘Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period and grounds by grounds of appeal which prima facie show good cause why the appeal should be heard’.

The affidavit of the appellant in support of his application is sparse in the extreme. In explaining his reasons for delay he says:

‘I had instructed my former attorneys, Christopher E Swan & Co to appeal this matter. It became apparent to me my former attorneys had not filed such an appeal. I’ve now retained Apex Law Group Ltd. They’ve written to

Christopher E Swan to obtain my files without success. This has resulted in this delay in filing the appeal on my behalf.

No detail is given regarding dates. ... There is very sparse information and reality no explanation for the period of delay

In our judgment this is an application which gets nowhere near succeeding and is accordingly refused.”

14. It is abundantly clear that an application for an enlargement of time in which to appeal must be supported by an affidavit which sets out in detail good and substantial grounds as to why the appeal was not filed in the prescribed period.

ANALYSIS AND CONCLUSION

15. The Appellant has not filed an affidavit setting out good and substantial reasons as to why an appeal was not filed in the prescribed time period. Indeed the Appellant has not filed an affidavit setting out any reason as to why an appeal was not filed in the prescribed time period much less good and substantial reasons. The high water mark is the Appellant’s affidavit, dated, February 2017, which deals with Mrs. Sadler-Best’s non-appearance at trial. This explains how judgment was obtained in the Appellant absence but does not begin to touch on reasons for delay in filing an appeal. Ms Tucker filed two affidavits which do not explain the delay.
16. Similarly, there is no affidavit which speaks to a *prima facie* good cause why the appeal should be heard.
17. I dismiss the Appellants’ Application by reason of his failure to provide an affidavit speaking to good and substantial cause for delay and *prima facie* good cause for an appeal.
18. I should add that had the reasons advanced in submission for delay appeared in an affidavit I would not have been satisfied that good and substantial reasons had been shown for the delay in filing an Intention to Appeal in the prescribed time period. I do not believe the following constitute good and substantial reasons for an 8 month delay:

1. Failure to attend trial;
 2. Loss of client file;
 3. Adopting the wrong procedure by seeking to set aside the judgment rather than filing a Notice of Intention to Appeal; and
 4. Difficulty in obtaining a trial transcript or Court Smart recording. If the Appellant had filed a Notice of Intention to Appeal that would have caused the Magistrates' Court to produce a Record of Appeal which would have included a trial transcript.
19. I award the Respondent the costs of his application on a nisi basis. If no application is made within 14 days for a different costs order the nisi award shall become absolute.

Dated 5 April 2019

JOHN E RIHILUOMA
ASSISTANT JUSTICE