

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL CAUSE No. 20 of 2018
(Formerly G 93 of 2016)

BETWEEN

H.E.B. ENTERPRISES LIMITED
HENRY E BODDEN JR

DEFENDANTS/APPELLANTS

-AND-

BERNICE RICHARDS
(as Personal Representative of the Estate of Anthony Richards Deceased)

PLAINTIFF/RESPONDENT

Before: The Rt. Hon Sir John Goldring, President
The Hon C. Dennis Morrison, JA
The Hon Sir Michael Birt, JA

Appearances: Mr Mark A Russell for the Plaintiff/Respondent
(The Defendants/Appellants did not appear at the hearing)

Heard: Thursday 3rd September 2020

Draft Judgment
Circulated: Thursday 17th September 2020

Judgment Delivered: 21st September 2020



JUDGMENT

Sir Michael Birt, JA

1. By notice of motion dated 18th December 2019, Bernice Richards (“the Plaintiff”), as personal representative of the estate of Anthony Richards, deceased (“Mr Richards”) applies for leave to appeal to the Judicial Committee of the Privy Council against the judgment of this Court dated 14th November 2019.
2. The application raises an issue as to the interpretation of section 4 of *the Cayman Islands (Appeals to Privy Council) Order* 1984 (“the 1984 Order”), which is in the following terms:-

“Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.”

The issue raised relates to the time limit of twenty-one days.

Background

3. On 24th May 2016, Mr Richards instituted proceedings against H.E.B. Enterprises Limited and Henry E Bodden Junior (“the Defendants”), seeking the return of all monies paid under two agreements into which Mr Richards and the Defendants had entered. Following a trial in February 2018, Williams J ordered the Defendants to repay the principal and interest paid by Mr Richards under the agreements amounting to a total of CI\$ 593,430.37, subject to certain agreed set offs of CI\$ 135,896.29, ie, a net sum of CI\$ 457,534.08.
4. The Defendants subsequently appealed and in a judgment dated 14th November 2019, this Court reduced the gross amount payable to Mr Richards to CI\$ 206,903.87. After allowance for the agreed set off, the judgment in favour of Mr Richards was therefore reduced to CI\$ 71,007.58.
5. Mr Richards had died on 8th February 2019 and the Plaintiff had been substituted for him in these proceedings following the grant of letters of administration with the will annexed in respect of the estate of Mr Richards.
6. There is no dispute that the decision of this Court contained in the judgment of 14th November 2019 is a final decision and the matter in dispute exceeds the sum of £300. There is therefore an appeal as of right to the Privy Council pursuant to section 3(1) of the 1984 Order. However, in accordance with standard practice, the Plaintiff must nevertheless apply for leave to this Court, albeit that the granting of such leave is a formality.
7. It was held by this Court in *Shanda Games Limited v Maso Capital Investments Limited and Others* (CICA, 27 April 2018) that the twenty-one day period in section 4 of the 1984 Order begins to run from the date of the filing of the order reflecting a judgment, not from the date of the judgment itself. The Certificate of the order of the Court reflecting the judgment of 14th November 2019 was sealed and filed by the Acting Registrar of this Court on 25th November 2019 (“the Certificate”). Accordingly, the Plaintiff should have filed her application for leave to appeal not

later than 16th December 2019. In fact, her application was not filed until 18th December, i.e. two days out of time.

8. We have received affidavit evidence from Mr James Kennedy, a partner in the firm of attorneys representing the Plaintiff, namely KSG Attorneys at Law, as to the circumstances in which this occurred. The position would seem to be as follows.
9. On 14th November 2019, a draft Certificate of the order of the Court was sent by Mourant Ozannes (“Mourants”), the attorneys for the Defendants, to Mr Kennedy, seeking comments on the draft within seven days. Having received no response within that time, on 22nd November Mourants emailed a copy of the draft Certificate to the Acting Registrar asking for it to be reviewed and signed. That email was copied to Mr Kennedy. The Acting Registrar replied the same day asking for the Certificate in Word form and this was supplied by Mourants by email the same day, with the email again being copied to Mr Kennedy.
10. As already mentioned, the Acting Registrar sealed and filed the Certificate on 25th November and at some unknown point thereafter, it was supplied to Mourants. It was not however sent to KSG by the Acting Registrar or by Mourants.
11. On 16th December Mr Kennedy emailed Mourants and the Acting Registrar enquiring whether there was yet a sealed order. Mourants replied by email the next day, 17th December, to say “*My apologies, please find attached the executed Certificate of the Order of the Court*”. As already mentioned, the Plaintiff filed her application for leave to appeal the next day namely 18th December.
12. Mr Kennedy explains in his affidavit that, following the handing down of the judgment on 14th November, his firm considered with the Plaintiff whether to appeal to the Privy Council and applied for legal aid on 30th November, with the application for a legal aid certificate being granted on 13th December.
13. The issue for this Court is whether it has jurisdiction to grant leave to appeal given that the application by the Plaintiff is two days out of time.

Contentions

14. On behalf of the Plaintiff, Mr Russell accepts that this Court does not have power to extend the period of twenty-one days laid down in section 4. However, he submits that it would be most unjust if she were unable to bring her application for leave to appeal in circumstances where, through no fault of her own, she was not aware that the Certificate had been issued until after the twenty-one day period had expired. This was because neither the Defendants' attorneys nor the Acting Registrar had forwarded a copy of the sealed Certificate to her attorneys. He invites the Court to construe section 4 so that the twenty-one day period only runs from the date when the Plaintiff became aware that the Certificate had been sealed and filed, namely 17th December.
15. Mr Russell also prayed in aid the observation of Henderson J in *Ebanks v Brooks* 2004-05 CILR 175 where, when addressing the purpose of *Grand Court Rules*, Order 42, R.2(1) which provides that any judgment or order which requires a person to do an act must specify the time after service of the judgment or order within which the act is to be done, commented at paragraph 16:-

“It would be unfair to require an act to be done within a certain period of time and make the time run from the date the order is pronounced because, in the absence of the respondent party, the order will not be brought to his attention until it has been drawn, signed, and served upon him. In effect, he would be robbed of part of the time period if such an order required the time to be calculated from the date of pronouncement.”

Mr Russell submits that the same principle should inform the interpretation of section 4 of the 1984 Order.

16. The Plaintiff accepts that, if this Court holds that it has no jurisdiction to consider her application for leave to appeal, she may apply directly to the Privy Council for leave to appeal, but submits it would be unjust to require her to incur this expense when she is entitled to appeal as of right.
17. The Defendants were not represented at the hearing but Mourants filed written submissions on their behalf. Their submissions pointed out that the Plaintiff's attorneys were given the opportunity of commenting on the draft Certificate but failed to do so and were also copied into the email dated 22nd November from Mourants sending the draft Certificate to the Acting Registrar. Despite this, the Plaintiff's attorneys made no enquiry of the Acting Registrar or Mourants for some twenty-four days after the draft Certificate was submitted to the Acting Registrar. The Defendants submitted that the words used in section 4 of the 1984 Order are “from

the date of the decision” and it is not possible to interpret these as meaning the date on which the prospective appellant has notice of the date of the decision. Furthermore, no serious injustice would be served by adhering strictly to the language of the section because the party wishing to appeal can always apply for leave from the Privy Council itself.

Decision

18. Mr Russell was correct to concede that this Court does not have power to extend the twenty-one day period. It is well established that, where a time limit for doing some act in relation to proceedings is contained in a statute, a court has no power to extend that period unless the statute itself so provides; see for example *Mucelli v Albania Government* [2009] 1 WLR 276; [2009] UKHL 2.
19. Although it was not raised in argument, I add for the sake of completeness that the only possible exception is where an extremely short time limit may in some circumstances “*impair the very essence*” of the right of access to a court in the determination of civil rights, in which event the court may exercise a discretion to extend a statutory time limit in exceptional circumstances if this is necessary to prevent a breach of the right of access to a court pursuant to Article 6 ECHR; see *Pomiechowski v Legnica District Court (Poland)* [2012] 1 WLR 1604; [2012] UKSC 20. The same argument may well apply in respect of section 7 of the Constitution. However, this exception could have no application in the present case as the twenty-one day time limit is not unusually short and, in any event, there would be no impairment of the right of access to a court because a prospective appellant can always apply for leave directly from the Privy Council itself.
20. Although, knowing that the draft Certificate had been sent by Mourants to the Acting Registrar on 22nd November, it would have been prudent for KSG to enquire somewhat earlier as to whether the Certificate had been filed rather than leaving the matter until after expiry of the twenty-one day time limit, one naturally has some sympathy for the Plaintiff, who finds that the time for applying for leave to appeal has expired before she was even aware that the Certificate had been filed.
21. Nevertheless, the language of section 4 is clear and unambiguous. The twenty-one day period runs from “*the date of the decision*” which, per *Shanda Games*, is the date of the filing of the Certificate. It is not open to this Court to interpret the clear wording of the section as meaning

something different, such as the date upon which a prospective appellant becomes aware of the filing of the Certificate, merely because hardship may be caused in a particular case.

22. Mr Russell accepted during oral argument that it might be difficult for this Court to construe section 4 generally to mean that time runs from the date upon which a party becomes aware that the Certificate has been filed, but submitted that, on the particular facts of this case, the Court should interpret section 4 in such a manner as to allow time to run from the date that the Plaintiff became aware of the filing of the Certificate because the difficulty had arisen through no fault of her own and had resulted in time having expired before she became aware of the filing of the Certificate.
23. I cannot accept that submission. The wording of the section cannot mean something different depending upon the particular circumstances of the case. On the clear wording of the section, the twenty-one day period starts to run from the date of the filing of the Certificate in every case.
24. Nor, in my judgment, can Mr Russell derive any assistance from the observation of Henderson J in *Ebanks v Brooks* quoted earlier. That observation was made in the context of *GCR* Order 42, r. 2 (1) which specifically provides that the time is measured from service of the judgment or order in question. That is completely different from section 4, which provides that time runs from the date of the decision.
25. For these reasons, this Court has no jurisdiction to grant the Plaintiff leave to appeal even in circumstances where she has a right of appeal, and she must therefore apply directly to the Privy Council if she wishes to pursue the matter. Her application is therefore rejected.

Security

26. In view of the decision that this Court does not have jurisdiction to grant leave to appeal, this issue does not arise. Nevertheless, it may be helpful to address the point briefly.
27. Section 5(a) of the 1984 Order provides that leave will be granted by this Court only upon condition of the appellant, within a period to be fixed by the Court not exceeding ninety days, providing security in a sum not exceeding £500. As pointed out by Martin JA in *Shanda Games*,

the practice for appeals as of right is for the Court to grant final leave to appeal subject to provision of security of CI\$500 within twenty-one days.

28. The Plaintiff has been granted legal aid for her intended appeal to the Privy Council and Mr Russell submits that, in those circumstances, no security should be ordered. He points out that the clear policy of the legislature in this jurisdiction is that her status as an assisted person would mean that a costs order could not be made against her in favour of an unassisted litigant. Thus, section 10(3) of the *Legal Aid Regulations* 2016 provides that “*No order for costs against an assisted person in favour of an unassisted party to any proceedings and no order for security for costs against an assisted person may be made in respect of any sum granted by way of legal aid*”; and *GCR*, Order 63, r. 4(8) states “*No order for costs shall be made against an assisted person*”.
29. Whilst the question of costs in respect of any appeal will be for determination by the Privy Council, I agree that, given the terms of the *Legal Aid Regulations* and the *GCR* referred to above, it would not be appropriate to order security in the conventional sum of CI\$500. However, I do not think it is open to this Court to order no security given the mandatory terms of section 5(a). Had this Court granted leave, I would therefore have ordered that the Plaintiff provide security in the nominal sum of CI\$5.

Postscript

30. *GCR* Order 42, r. 5 deals with the drawing up and filing of orders. Rule 5(5) provides that the attorney for the successful party shall draw up the order and circulate it to the attorneys for the other parties who shall endorse it “*approved as to form and content*”. Paragraphs (6) and (7) then provide what is to be done by the Clerk of the Court upon receipt of a draft order.
31. Paragraph (8) then provides:-
- “The Clerk of the Court shall notify the party who drew up the judgment or order when it has been filed and shall provide such party with as many sealed copies as he may require upon payment of the prescribed fee.”***
32. Thus, the only obligation of the Clerk of the Court is to notify the attorney of the successful party, who drew up the draft order, that the order has been filed and to provide copies to that attorney. Nothing is said about notifying and supplying copies to other parties (other than paragraph (3), which states that the Clerk will provide copies of a sealed order upon request).

33. We were informed by Mr Russell that the procedure followed in practice is rather different to that provided for by paragraph (8) in that the Clerk of the Court will in fact either email a copy of the sealed order to all parties or make it available for collection in the box of the relevant firms of attorneys. However, that does not appear to have happened in the present case. I consider it important that all parties to proceedings automatically receive copies of all orders made in those proceedings.
34. It is of course a matter entirely for those responsible for the *GCR* but we would invite those authorities to give consideration to modifying paragraph (8) so as to provide that the Clerk of the Court shall, once the order has been filed, supply copies of the sealed order to the attorneys of all parties (or any party acting in person) rather than just to the party who has submitted the draft order.

Dennis Morrison JA

I agree.

Sir John Goldring P

I also agree.

