IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS **Case No. CL161/2011**

THE HON. MR. JUSTICE CHRISTOPHER GARDNER Q.C.

BETWEEN:

JEROME BROWN

-and- Appellant

ALTAGRACE BROWN

Respondent

Hearing: **5 October 2011**

Representation:

Plaintiff: George C. Missick, Counsel

Defendants: Oliver Smith, Counsel

JUDGMENT

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1. The Appellant seeks leave to appeal out of time against the Judgment of Senior Deputy Registrar Fraser Hirst dated 29 July 2011. By Order 58 Rule 3 of the Civil Rules 2000 the Appellant had 5 clear days in which to appeal, and so the appeal notice was due on 5 August 2011. The Notice of Motion for leave to appeal was filed on 23 September 2011, some 7 weeks thereafter.

2. The reasons for the delay given in the Notice are twofold. Firstly, that the Appellant was attempting to settle outstanding matters with the Respondent. Annexed to his Affidavit in support is a letter from his attorney to the Respondent's attorney, dated 3 August 2011, suggesting a joint inspection of the properties upon the Parcels of land, of which each had been held entitled to a 50% beneficial interest, and the drawing up of proper rental agreements with the tenants of those properties. That came to nothing. Had it done so, it is a fair inference that no appeal would have been thought necessary. Secondly, it is asserted that the absence of the Appellant's attorney from the Jurisdiction for 3 weeks had hindered him from being able to take advice and to give instructions.

3. Counsel, to whom I am grateful, referred me to the notes to Order 3 Rule 5 in Volume 1 of the White Book and to various authorities relating to the exercise of the Court's discretion to extend time. In chronological order they were Ratnam v Cumarasamy (1965) 1 W.L.R. 8; Norwich & Peterborough Building Society v Steed (1991) 449; Costello v Somerset County Council (1993) 1 W.L.R. 256; Saville v Southend H.A. (1995) I W.L.R. 1254; The Mortgage Corporation Ltd. v Sandoes & Others (1997) P.N.L.R. 263; Finnegan v Parkside Health Authority (1998) 1 W.L.R. 411; Patel v Patel, Court of Appeal, 19 October 1998.

4. In the present case I am not concerned with a situation in which no reasons for delay have been given. Where they have been, although the authorities are not entirely consistent as to the factors relevant to extension of time applications, I consider that they do establish that the following principles should be applied:

1. The rules of court and associated rules of practice, devised in the public interest to promote expeditious dispatch of litigation, are there to be obeyed, and are not merely targets to be attempted. Otherwise a party in breach would have an unqualified right to an extension, thereby defeating their purpose.
2. Non-compliance covers a wide spectrum of circumstances. Their gravity depends in part on the nature of the order/rule that is being disobeyed and in part on the reasons for disobedience. The longer the delay, the more closely the Court will look at the adequacy of the reasons for the delay.
3. It is against that background that the Court has regard to the chances of the appeal succeeding.
4. The degree of prejudice to the respondent, which cannot be adequately compensated by an award of costs if the application is granted, is also a consideration.
5. Having considered these factors, none of which are absolute, and all the circumstances of the case, the Court considers the overriding principle that justice has to be done when deciding whether, in the exercise of its wide discretion, the appeal should be allowed in whole or in part.
6. Once the time for appealing has elapsed, the respondent, who was successful in the Court below on the merits, is entitled to regard the judgment in his favour as being final and, if he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise.

5. Here a determination has been made, and the obvious points that can be made in relation to the delay are, firstly, that the desire to negotiate is not a reason for not filing an appeal notice, which may even have had the effect of concentrating the mind of the Respondent upon such negotiations. Secondly, the Appellant's attorney did not leave the Islands until 5 August 2011, and so there was an opportunity for advice to be given regarding an appeal and, in any event, he was

not a sole practitioner. Even after he returned, another four weeks elapsed before leave was sought. The length of the delay, therefore, cannot be said to be insignificant.

6. Against that background I turn to consider the chances of an appeal succeeding. The first 6 Grounds of Appeal relate to the Senior Deputy Registrar's findings in relation to the parties' beneficial interests in Parcel 53. He had before him 2 affidavits and a bundle of documents from the Appellant and an Affidavit and bundle of documents from the Respondent, which included the parties' Haitian marriage certificate dated 10 July 1986. They separated in about 2004. Thereafter, as often happens, relations between them deteriorated and, in a matrimonial dispute concerning property, the desire of a party to advance his/her case can result in exaggeration and lack of veracity. It is clear that the Senior Deputy Registrar was entirely alive to this. He had the advantage of hearing hours of oral evidence from both parties, and his Judgment was arrived at as a result of hearing what each had to say, and how they dealt in cross-examination with the inconsistencies in their testimony. He then decided whose evidence in relation to the conflicting contentions he preferred. In this 1 do not consider that his approach can be faulted.

7. In determining the beneficial interests in Parcel 53 he was right to look at the circumstances of the purchase. His finding that the Appellant's evidence was appallingly inconsistent was entirely justified in view of the matters that he rehearses in paragraph 8 of his Judgment, and severely undermined his contention that the Parcel was registered in his name alone because he was not married to the Respondent at the time.

8. I do not accept that, having found some inconsistencies in the Respondent's evidence, the Senior Deputy Registrar was prevented from preferring her evidence as to the payment of installments towards the purchase price of the Parcel having, as he states, listened carefully to her evidence, and having found the Appellant's evidence far from convincing. He was doing precisely what is required of him, namely to consider and weigh the evidence and make findings as to the evidence that he accepted. Having done so, I do not consider that there are realistic prospects of successfully appealing his finding of a joint intention that the beneficial interest in Parcel 53 should be shared equally. He correctly directed himself that it was for the Respondent, the sole name on the Land Register being that of the Appellant, to prove that intention, and that he had to determine the case on the evidence that was put before him, remembering the onus and burden of proof. Having done so, he was entitled to make critical findings of fact in the Respondent's favour.

9. In all the circumstances, including the fact that these issues were fully ventilated and properly determined, I do not consider that it would be just for me to exercise my discretion so as cause them to be retried, and thereby prejudice the Respondent by depriving her of the Judgment in her favour.

10. The Originating Summons also sought an account of the rents that the Respondent had received since 2004, and of how such sums had been applied, so that the Appellant could quantify his 50% net share thereof As a result of an application for further discovery, the Respondent had disclosed receipts of rent for the last 2 years. At paragraphs 28 and 29 of the Judgment it is noted that the Respondent is responsible for the management of the units on the Parcels in respect of which she collected the rents, out of which she paid the costs of maintenance and refurbishment. The Senior Deputy Registrar also notes that there were disputes as to the number of apartments standing on the Parcels, and as to the rent that was being received. He considered that this was nearer to the sum of $1,440 per month quoted by the Respondent. Annexed to the Affidavit in support of this appeal is a statement from a police officer who states that he has visited the property and found a total of 49 units, with 49 tenants, each of whom pays $200 a month, making a total of $9,800 per month, a figure much nearer to that contended for by the Appellant. At paragraph 31 the Senior Deputy Registrar considers the deductions from the rental receipts that the Respondent would have been able to set off against the Appellant's half. He considered that it was not possible to quantify the maintenance payments, although counsel informed me that there were receipts from which a calculation could have been made. He makes some quantifications, but does not seek to calculate the total amount of the deductions and instead asserts, at paragraph 32, that it was absolutely impossible to do so, as the information before him was insufficient. He refers particularly to maintenance for the children of the family, the Respondent having contended that the Appellant had agreed that sums could be taken from his entitlement to cover them. In respect of the deductions, the information would be available to the Respondent and, if she wished them to be taken into account, the evidential onus was on her to detail and quantify them.

12_ In the circumstances, I do not consider it was open to the Senior Deputy Registrar to assume that the deductions, if quantifiable, would have the result of significantly reducing or possibly extinguishing the Appellant's 50% entitlement to the net rental payments. Nor do I believe that he would have done so if he had had information before him to suggest that they amounted to $9,800 per month.

13. In the result I am satisfied that justice requires that I should exercise my discretion to give leave to extend the time of appealing to 23 September 2011 limited to the quantification of the rents and profits received by the parties from Parcels 53 and 56 since their purchase, so that the Appellant's entitlement to 50% thereof after the sums properly deducted therefrom have been taken into account, can be determined. To that extent this application-succeeds, and 1 shall give further Directions in relation to the hearing of the appeal.

14. I accept the submissio that there should be no order as to costs on this appeal.

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Justice Christop
7 October 20 11 er