COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No 70 of 2020

B E T W E E N

RAYMOND ROLLE

Intended Appellant

AND

MICHAEL PREUSS

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, President**

The Honourable Mr. Justice Jones JA

The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Keod Smith, Counsel for Intended Appellant**

Mr. Sebastian Masnyk, with Ms. Chizelle Cargill, Counsel for Respondent

DATES: **2 October 2020; 7 October 2020; 14 January 2021**

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Civil Appeal- Application for Extension of Time- Rule 11 of the Court of Appeal Rules- Interlocutory Order- Recusal of a Judge- Prospect of Success

On the 8 May 2020 the intended appellant, Raymond Rolle, was denied an application for recusal of the presiding judge, Stewart, J , from the hearing of a bankruptcy petition against him. He sought and was grant leave to appeal the ruling on 3 June 2020. On the 29 June 2020 the

intended appellant filed a Notice of Appeal. This Notice was filed beyond the fourteen (14) day time-frame prescribed by Rule 11 of the Court of Appeal Rules. On 7 September 2020 the intended appellant applied for an extension of time to file his Notice of Appeal on the Court of Appeal.

Held: appeal is dismissed; application for the extension of time denied. The applicant will pay the respondent's costs to be taxed if not agreed.

There is no doubt that the appeal was filed out of time. The time for appealing an interlocutory order is 14 days from which it is made not 14 days from which leave is granted. It is common ground that the factors to be considered by the court in considering an application to extend the time are length of delay, reasons for the delay, prospects of success and prejudice to the other side If this appeal had good prospects of success, the extension of time would have been granted, despite the delay and the reasons for it. The judge applied the correct jurisprudence and exercised her discretion properly. The appeal has no prospects of success and it is on that basis that the extension of time is refused.

Junkanoo Estates Ltd et al v UBS Bahamas Ltd [2017] UKPC 8 applied

Watts v Watts [2015] EWCA Civ 1297 applied

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, President:

1. On the 29 June 2020 the intended appellant, Raymond Rolle, filed a Notice of Appeal seeking to set aside a ruling by Stewart J whereby she refused an application by Rolle that she recuse herself from further hearing a bankruptcy petition brought against Mr. Rolle by Michael Preuss.

2. The Ruling by Stewart, J was made on the 8 May 2020.

3. Mr. Rolle sought leave to appeal that Ruling and leave was granted on the 3 June 2020.

4. On the 9 July 2020 the attorneys for the respondent, Mr. Preuss, advised Mr. Rolle's attorney that the appeal was out of time and that they would be taking that point as a preliminary objection.

5. On the 7 September 2020, almost two months after he was notified of this issue, Mr. Rolle applied for an extension of time to file his Notice of Appeal and for an Order that the Notice of Appeal of 29 June 2020 stand as the appeal.

6. That application was supported by an affidavit of Mr. Rolle filed on the 18 September 2020. That affidavit was in the following terms:

> **"I, RAYMOND ROLLE, of the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, Attorney-at-Law, make oath and say as follows:-**
>
> **1. I am an Attorney-at-law practicing at the Bar of The Bahamas having been called to the Bar on the 29 October 1996. I am the named Appellant in this matter and make this Affidavit in support of my Notice of Application filed herein on the 7 September 2020.**
>
> **2. On the basis of what my Attorney, Mr. Keod Smith informs me, and which I do verily believe, I have a good arguable appeal with a good prospect of success as set out in the grounds of the that was attached to my Amended Notice of Motion filed in the Court below on 15 May 2020 for leave to appeal against the written Ruling Her Ladyship The Honourable Madam Justice Diane Stewart *("Justice Stewart")* dated 6 May 2020 wherein she determined not to recuse herself from those proceedings although my Notice of Motion for recusal filed on December 2019 was heard on 6 December 2019. Although Justice Stewart determine not to recuse herself, she did not perfect an Order coming out of her Ruling in the Court below until about 15 May 2020 when said Ruling was filed in the Court below.**
>
> **I now produce and annexed hereto marked as exhibits "RR-1, "RR-2", "RR-3 and "RR-4" photocopies of the said Notice of Motion for recusal, the said written Ruling, its corresponding Order filed on 15 May 2020 and the Amended Notice of Motion for leave to appeal, respectively.**
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> **3. My said intended appeal was exhibited to the said Amended Notice of Motion for leave to appeal with the grounds detailedly set out therein, and which is reflected in the Notice of Appeal Motion ("NOAM") filed by me herein on June 2020.**
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> **4. I was told by my Attorney, Mr. Keod Smith and do verily believe, that as my application for recusal is considered to be "interlocutory", I would have been required by the provisions of the Court of Appeal Act and its**

accompanying Rules, to have filed my intended NOAM within the first 14 days of the date on which the Order granting leave to appeal was perfected seeing that my application for leave to appeal was not finally acceded to and perfected in an Order dated 3 June 2020 and filed in the Court below on 15 June 2020. I now produce and annexed hereto marked as exhibit "RR-5" a photocopy of the said Order filed in the Court below on 15 June 2020.

5. **Following on from that, on the 14th day after receiving the perfected Order granting me leave to appeal, namely 29 June 2020, I did file my NOAM virtually in the same form that it appeared in my said Amended Notice of Motion exhibited above at "RR-4".**

6. **By letter dated 14 July 2020 addressed to the Ms. Ann Frazier, Assistant to the Deputy Registrar of the Court of Appeal, the Respondent's Counsel, indicated therein that he objected to the date that had been fixed by the Registrar of the Court of Appeal for Settling of the Record on the basis that he was of the view that my NOAM was supposed to have been filed on or before 22 May 2020. However, he seemed not to have taken into consideration all that I had set out above leading up to the date on which Justice Stewart had perfected her Order granting leave to appeal which I am told by Attorney Mr. Smith, and do verily believe, was the date that time began to count for the purposes of the 14-day time period as required under the Rules. I now produce and annexed hereto marked as exhibit "RR-6" a photocopy of the said letter of the 14 July 2020.**

7. **In any event, as it is clear that my Amended Notice of Motion exhibited at "RR-4" above exhibits thereto, the NOAM that I had actually filed herein evidences my compliance with the Rules of this Court or, if I might respectfully say, gives reasonable basis upon which this Honourable Court would exercise its discretion to extend or otherwise enlarge the time within which to file my NOAM and treat that which I have filed as being properly filed duly moving the Court in the circumstances.**

8. **I am told by Mr. Keod Smith, my Attorney, and do verily believe, that this state of affairs led him to, out of an abundance of caution, rather than using time, energy and money to combat such an application, instead acceded to**

the request of the Respondent's Counsel to formerly request of the Court that time be extended allowing my appeal to stand as it currently is. This position was stated in a letter over his signature dated 15 July 2020 addressed to the said Ms. Ann Frazier.

I now produce and annexed hereto marked as exhibit "RR-7" a photocopy of the said letter of the 15 July 2020.

9. **As the Court can see from my application for leave to appeal by Amended Notice of Motion (see exhibit "RR-4" above) in the Court below on 15 May 2020. I always had my intended NOAM exhibited thereto which , in the main, was never altered and showed my readiness to proceed in the Court of Appeal which was also reflected in the wording of my NOAM.**

10. **The delay associated with me filing my appeal was not for want to prosecute said appeal, but due to matters beyond my control or on a reasonable misunderstanding as how the Court would decide then the time to begin counting begins, at the date of Justice Stewart delivering her written Ruling or on the date that she perfected her Order granting leave to Appeal.**

11. **In all of the circumstances, I humbly request that this Honourable Court accede to the application being made for the extension pursuant to Rule 9 of the Court of Appeal Rules, I do not believe that this extension of time in any form prejudices the Respondent.**

12. **The matters deposed to in this Affidavit are either within my own knowledge, in which case they are true, or are based upon information supplied to me by others, in which case I identify the source and state that those matters are true to the best of my knowledge and belief."**

7. There was an affidavit in response filed on behalf of Mr. Preuss by his lawyer McFalloughn Bowleg Jr. That affidavit was as follows:

"I, McFalloughn Bowleg Jr. of the Southern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, Counsel and Attorney-at-Law, make Oath and Say as follows:

1. **I am an Associate at Lennox Paton which represents Michael Preuss, the Intended Respondent ("the Respondent") herein, and I assist Ms. Chizelle Cargill, the attorney who has carriage of the action on his behalf. Accordingly, I am duly authorized to make this Affidavit on behalf of the Respondent.**

2. **The facts set out herein are derived from my review of the files in this matter and from information supplied to me by the Respondent and Ms. Chizelle Cargill. Insofar as the matters deposed to herein are within my own knowledge they are true and, insofar as they are in accordance with information furnished to me or derived from statements or documents which I have read, they are true and correct to the best of my knowledge, information and belief, and I state the source.**

3. **I make this Affidavit in response to the Affidavit of Raymond Rolle filed 18 September 2020 ("the Rolle Affidavit") filed on behalf of the Intended Appellant ("the Appellant").**

4. **Mr. Rolle, at his paragraphs 4-6, states that he was advised by his attorney that the time period in which he was obliged to file his Notice of Appeal Motion ("the Notice Motion") commenced on the date on which the Court Order granting leave to appeal was perfected. However, the language of the Rules of the Court of Appeal is clear, it states that time begins to run from the date a judgment or order is pronounced not perfected.**

5. **At paragraph 7 of the Rolle Affidavit, Mr. Rolle asserts that the Notice Motion exhibited to the Amended Notice of Motion filed in the Supreme Court on 15 May 2020 ("the Leave Motion") evidences actual compliance with the Rules of the Court of Appeal. I am advised and verily believe that the Notice Motion exhibited to the Leave Motion was not before this Court of Appeal and was exhibited for the purposes of the leave application in the Supreme Court. The date that it was drafted is irrelevant. The only material date is the date upon which the Notice Motion was in fact filed with the Court of Appeal, being the 29 June 2020.**

6. **At paragraph 8 of the Rolle Affidavit, Mr. Rolle states that his attorney acceded to the Respondent's request to vacate the hearing to settle the record 'out of an abundance of caution' over 'the state of affairs'. I am advised and verily believe that the Notice of Appeal Motion filed by the Appellant was filed outside the time prescribed by the Rules and in the absence of obtaining leave to so do. It was therefore appropriate for the hearing to settle the record to be vacated as there was no competent appeal before the Court.**

7. **There has notably been no explanation offered as to why, notwithstanding that the Respondent highlighted the necessity of making a formal extension of time application in the letter dated 14 July 2020 and exhibited at RR-6 of the Rolle Affidavit, the Appellant waited until the 7 September 2020 to file his application. This was 7 weeks and 6 days after the Appellant was notified that the application was out of time and that no application to extend time was made. This was acknowledged in the letter sent by the Appellant dated 15 July 2020 and exhibited at "RR-7" of the Rolle Affidavit in which he says:**

> ***"...we have no objection to the date fixed by the Court of Appeal ("COA") for the settling of the record being vacated for the purposes of first getting the COA to formerly extend the time within which the Notice of Appeal Motion already filed can be deemed as regularly filed.***
>
> ***Formal application will be filed in short order."***

8. **Mr. Rolle states at paragraph 8 that Mr. Rolle showed his readiness through having exhibited a Notice Motion which was not substantially altered. Notwithstanding the alleged readiness, Mr. Rolle delayed in making his application for an extension of time despite having been made aware that such an application was required.**

9. **At paragraph 10 of the Rolle Affidavit, it is averred, simply and without specificity, that the delay associated with the failure to file the Notice Motion in time was '*not for want to prosecute said appeal, but due to matters beyond my control or on a reasonable misunderstanding***

as to how the Court would decide when the time to begin counting begins'.

a) Mr. Rolle does not specifically state what the exact matters beyond his control were and how

they impacted his ability to comply with the time periods set out in the Rules of the Court of Appeal. The assertion is therefore entirely unhelpful.

b) Mr. Rolle also relied on, effectively, the lack of certainty of his counsel on when time begins to run under the Rules of the Court of Appeal, however, both Mr. Rolle and his attorney are experienced professionals, and were capable of researching a straightforward legal issue. The uncertainty or mistake of legal counsel is not a good reason for delay.

10. In the circumstances, there are no good reasons offered in the evidence of Mr. Rolle which support his application. On that basis, I humbly request that this Honourable Court dismisses the Appellant's application."

8. In our judgment there is no doubt that the appeal was filed out of time.

9. Rule 11 of the Court of Appeal Rules provide:

"11.(1) Every notice of appeal shall be filed, and a copy thereof served by the appellant upon all parties to the proceedings in the court below who are directly affected by the appeal —

a) in the case of an appeal from an interlocutory order, fourteen days;
b) in any other case, six weeks,

calculated from the date on which the judgment or order of the court below was pronounced or made."

10. The time for appealing an interlocutory order is 14 days from which it is made not 14 days from which leave is granted.

11. If the 14 days period has expired before leave was granted it is necessary to apply to the court for an extension of time. This was made clear by Lord Sumption in **Junkanoo**

Estates Ltd et al v UBS Bahamas Ltd [2017] UKPC 8. In that case the appellants sought to appeal an interlocutory decision of the trial judge granting summary judgment to the respondent. The appellant sought to appeal that interlocutory order without having first obtained the leave of the trial judge. Lord Sumption said at paragraph 8:

> **"8. The proper course would have been to apply first to Evans J, on notice to the plaintiff bank, for leave to appeal. If that application for leave had been made in the ordinary way by notice of motion, the registry would have been bound to receive it and list it for hearing before the judge. <u>If leave had been given, the next step would have been to apply to the Court of Appeal for an extension of time for the appeal.</u> If leave to appeal had been refused, application could then have been made to the Court of Appeal for leave to appeal and an extension of time." (Emphasis Added)**

12. It is to be noted that the appeal was filed more than 14 days after leave was granted on the 3 June 2020.

13. The appeal is out of time. Therefore, should the extension be granted?

14. It is common ground that the factors to be considered by the court in considering an application to extend the time are length of delay, reasons for the delay, prospects of success and prejudice to the other side.

15. The length of the delay in this matter is not inordinate. The reasons for the delay are ignorance of the law and the delays attributable to negligence. If the appeal had good prospects of success, I would not refuse to grant the extension of time because of the delay and the reasons for it.

16. In my judgment, this appeal has no prospects of success and it is on that basis that I would refuse the extension of time.

17. The facts giving rise to the application for recusal are not in dispute. Mr. Rolle is a counsel and attorney of the Supreme Court. He represents a client in a disciplinary complaint to the Bar Council made in 2007 against the firm of McKinney Bancroft & Hughes. Stewart J was a member of that firm until October 2018 when she was appointed a Justice of The Supreme Court. In 2019, after Stewart J left the firm Mr. Rolle's client commenced an action against that firm. Mr. Rolle act on behalf of the client in that 2019 action. It is because Mr. Rolle acts as the attorney for a client who has a dispute with the firm of McKinney Bancroft and Hughes, Mr. Rolle asked Stewart J to recuse herself. In a ruling of 37 paragraphs Stewart J refused the application and it is that refusal that is the subject of the appeal.

18. I have considered that ruling and the proposed grounds of appeal. I am satisfied that the judge applied the correct jurisprudence and exercised her discretion properly.

19. I agree with the judge when she said:

> **"24. The crucial fact which has a bearing on the issue of bias in this application is that the Applicant is not a party in the Writ Action but simply an attorney providing legal services; a task which can be changed at any time by the Plaintiff in that action. He has no interest in the litigation and therefore cannot meet the test of the appearance of bias. Further I do not accept that relying on a statement made 10 years ago adds any substance to the claim. Bearing in mind what was said previously in the authorities referred to, unless there is credible evidence to the contrary, there is always a presumption of impartiality."**

20. And when she said at paragraph 27:

> **"27. Would the reasonable and fair-minded observer, who is neither complaisant or unduly suspicious conclude that I am biased or would be biased because I made a statement 10 years ago that I loved the firm and that someone who is not appearing before me or who is not a party before me is suing that firm, and that that action is not before me? I think not. The fact that the Applicant is performing a service for that person does not give him any interest or further any right to utilize that relationship for his own benefit."**

21. I adopt the views of Sales LJ (as he then was) in **Watts v Watts** [2015] EWCA Civ 1297.

22. In that case proceedings concerned two actions which related to a dispute between the parties over their late mother's estate. At the commencement of the trial, an issue arose as to whether the deputy judge should recuse herself on grounds of appearance of bias, on the footing that, in the course of her ongoing practice as a barrister, she was engaged in long-running, unrelated litigation in which she was leading the claimant's barrister. The defendant contended that that gave rise to a legitimate concern that the judge would favour the claimant in deciding the case. The judge dismissed the defendant's application that she should recuse herself.

23. The English Court of Appeal upheld the judge's decision to refuse to recuse herself. Sales LJ said:

> **"i) The notional fair-minded and informed observer would know about the professional standards applicable to practising members of the Bar and to barristers who serve as part-time deputy judges and would understand that those standards are**
>
> **part of a legal culture in which ethical behaviour is expected and high ethical standards are achieved, reinforced by fears of severe criticism by peers and potential disciplinary action if they are departed from**
>
> **ii) The notional fair-minded and informed observer would understand that a part-time judge's approach to the case she is trying and to her relationships with other professionals will be governed by these professional standards. There is no reason to think that a judge would allow her professional training and ethics to be overridden by a concern not to upset a junior counsel she is leading in other litigation. Moreover, the judge would know that the junior counsel would himself understand that she is bound by strict professional standards, and hence would have no expectation that she would do anything other than act in accordance with them. So, the judge would not expect any disgruntlement or difficulty to arise in her relationship with the junior counsel even if she makes a decision adverse to him in the case she is trying. Accordingly, the idea that the judge would adjust her behaviour as judge to avoid upsetting the junior counsel is far-fetched indeed. The notional fair-minded and informed observer would not consider that there was any genuine possibility of this occurring"**

24. Although the comments were made in the context of a practicing lawyer acting as a judge on a part time basis, it is equally applicable to a full time judge. The idea that a member of the Bar much less a judge would hold a personal grievance or animosity against another member of the Bar simply because that member of the Bar acting in a professional capacity represent a client in a matter adverse to the interest of that member of the Bar is antithetical to the concept of being a lawyer.

25. As pointed out, it is not Mr. Rolle who is suing McKinney Bancroft & Hughes, it is his client who is suing that firm. None of that has anything to do with the bankruptcy action.

26. Lawyers represent clients who sue other lawyers for professional negligence all the time. It is their duty to do so. No lawyer, much less a judge, would hold any animus against a

lawyer for representing his client, even against that firm. In my judgment, no fair-minded and informed observer who is expected to know the duties and standards of lawyers would have a reasonable fear that a judge would be biased against a lawyer simply because he represents client in a matter against the firm with whom that judge had a professional relationship.

27. We are satisfied that the proposed appeal has no prospects of success.

28. The application for an extension of time to appeal is refused. The applicant will pay the respondent's costs to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Jones, JA

The Honourable Mr. Justice Evans, JA