

BETWEEN:

DAWN MARIE CONNOLLY

Proposed Appellant

and

WADSWORTH COOLIDGE CONNOLLY

Proposed Respondent

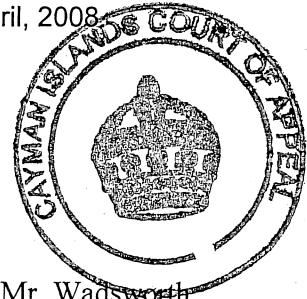
Before: The Right Hon. Sir John Chadwick, President
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Dr. Justice Conteh, Justice of Appeal

Appearances: Mr Lee Freeman of Priestleys for the Proposed Appellant and Ms. Eileen Nervik of Nervik and Company instructed by Ms. Sheridan Brooks of Brooks & Brooks for the Proposed Respondent.

Heard and Judgment delivered: 31st March 2009. Reasons released: 20th April, 2008

Sir John Chadwick, President

Reasons for Judgment



1. On 31 March 2009 we upheld the objection made on behalf of Mr Wadsworth Connolly (to whom I shall refer for convenience – and, I trust, without giving offence – as “the husband”) to the hearing of an appeal by Mrs Dawn Connolly (“the wife”) from an order made by Justice Levers in ancillary relief proceedings as long ago as 20 June 2003. We indicated that we would put our reasons in writing.
2. The parties were married on 26 April 1996. The marriage broke down after a few years and the husband filed a petition for divorce on 11 January 2002. The husband was then aged 65 years: the wife was some 21 years younger. There was one child, Lewis, born on 20 March 1996.
3. After a number of interim orders for ancillary relief, the proceedings came before Justice Levers on a hearing for the final determination of ancillary matters in May

2003. The judge determined those matters by her order of 20 June 2003. She made an order for joint custody of Lewis, with care and control to the wife for so long as she lived in the Cayman Islands and fortnightly staying access to the husband. She ordered the husband to pay CI\$400 per month as maintenance for the child; and a further CI\$400 per month for the maintenance of the wife for a period of two years. She ordered that the wife be permitted to reside in a property at North Side, Grand Cayman, owned or provided by the husband until the child reached the age of seventeen years. She divided certain chattels between the parties; but made no order in relation to the former matrimonial home, which was owned by the husband, or in relation to other property which the husband had acquired before the marriage, or in relation to monies to which he had become entitled during the marriage by inheritance or gift. On the same day, 20 June 2003, the marriage was dissolved by final decree.

4. The parties had been represented by counsel: the wife on legal aid. Shortly after the hearing on 20 June 2003, the wife instructed a new firm of lawyers, Quin & Hampson. They did not come on the record: they were, as they put it in correspondence with the husband's lawyers, acting as *amicus*, pending transfer of the wife's legal aid certificate. Nevertheless, on 3 July 2003, they filed notice of appeal on her behalf; and, on 22 July 2003, they sent a copy of that notice to the husband's lawyers. So far as material the notice of appeal sought orders that the wife have sole custody (as well as sole care and control) of the child, that the husband pay maintenance for the child in an amount greater than CI\$400 per month, and that the husband pay to the wife "such lump sum that is just and equitable in the circumstances". On 10 September 2003 Quin & Hampson wrote to the Registrar of the Court to inform her that, until they were in receipt of legal aid, they could not file grounds of appeal, that the appeal would not be ready for hearing at the November sittings of the Court, and that "realistically, this matter will be heard next year."
5. Legal aid, limited to instructing Quin & Hampson to read the papers, file grounds of appeal and give an opinion, was granted to the wife on 19 September 2003. On 13 February 2004 the Registrar wrote to that firm to enquire whether they would come on the record, and whether the appeal was to proceed. She pointed out that she needed to know the position "prior to requesting a copy of the Judge's extensive notes". Quin & Hampson's response, by letter dated 24 February 2004, was that they hoped to be

able to give an opinion shortly; and that, if legal aid were then granted for the appeal, they would come on the record. A copy of that letter was sent to the husband's lawyers. Despite efforts by the wife to obtain the opinion she had been promised, Quin & Hampson seem to have taken no further steps in the matter. On 1 April 2004 they returned the legal aid certificate to the Legal Aid Officer; observing that they had recommended the wife to retain alternative counsel.

6. There is nothing in the papers before the Court to suggest that any steps were taken to pursue the appeal, under the notice dated 3 July 2003, until 20 November 2008. Grounds of appeal were filed on that day by new lawyers: the fourth firm to act for her since Quin & Hampson.
7. Nevertheless, in the period of some four and a half years since Quin & Hampson ceased to act, there had been considerable activity. It is conveniently summarised in a chronology set out in the husband's affidavit sworn on 26 March 2009. That chronology is supported by the documents in the bundle which is exhibit WCC1 to that affidavit. It is sufficient, I think, to mention the following:
 - (1) On 9 August 2004 there was a hearing before Justice Levers of the husband's application to vary the order of 20 June 2003 in respect of care and control and the wife's cross-application for a variation in respect of custody and maintenance. The judge dismissed both applications. There is nothing to suggest that the judge was told that her earlier order was under appeal. The wife was then represented by Ritch & Connolly. On 23 August 2004 that firm came off the record.
 - (2) On 14 December 2004 there was a hearing before Justice Henderson in relation to the wife's refusal to return the child's passport to the Court office. The wife was then represented by McKinney Reid & Co. There is nothing to suggest that Justice Henderson was told that the order of 20 June 2003 was under appeal.
 - (3) On 20 December 2005 McKinney Reid & Co filed an appeal on behalf of the wife seeking payment for one of the chattels which was the subject of the order of 20 June 2003. That appeal was not pursued.
 - (4) On 29 and 30 May 2006 there was a hearing before Justice Hall (acting) of the wife's application to take the child permanently out of the jurisdiction: a matter prohibited by the order of 20 June 2003. The judge gave an extensive judgment, on 11 July 2006, dismissing that application. It is inconceivable that, if the judge

had been aware that the order of 20 June 2003 was under appeal, she would not have mentioned that fact in her judgment. She did not do so.

- (5) On 10 November 2006 McKinney Reid filed notice of appeal from Justice Hall's judgment. In April 2007 McKinney Reid filed a draft notice of motion seeking an extension of time to file grounds of appeal in respect of that appeal. Draft grounds of appeal were exhibited to an affidavit sworn by the wife on 30 May 2007. In that affidavit she made no mention of her intention to pursue an appeal (of which, by then, notice had been on the file for nearly four years) against the original order of 20 June 2003.
- (6) On 15 June 2007 the motion to extend time for appealing from the order of Justice Hall was dismissed by Justice Smith (sitting as a single judge of this Court). At that hearing the wife was represented by new lawyers, Broadhurst Barristers, who had come on the record.
- (7) On 12 September 2008 Broadhurst Barristers were replaced on the record by Priestleys, following notice of change. On 15 October 2008 Priestleys sought, and obtained, from Justice Foster an order increasing the maintenance payable by the husband in respect of the child from CI\$400 to CI\$500. Directions were given for the filing of affidavits in respect of the wife's further application to take the child to live with her in Florida and the husband's cross-application for care and control. A ruling of the Chief Justice, given in chambers on 5 November 2008, indicates that he was then told that Justice Foster's order (increasing maintenance for the child) was itself likely to be appealed. As I have said, it was not until some three weeks later that grounds of appeal were eventually filed in respect of the original order of 20 June 2003. Those grounds raise the question of maintenance for the child: the matter which had already been before Justice Foster on an application to vary the original order.

There is nothing in the papers before the Court to suggest that, during the period from August 2004 until November 2008, either the husband or any of the judges before whom the various applications to which I have referred were made were told that the wife intended to pursue an appeal from the order of 20 June 2003. It may be that the lawyers whom the wife instructed after Quin & Hampson ceased to act were unaware that notice of appeal from that order had been filed. Be that as it may, no explanation has been offered for that failure.

8. In those circumstances it is a matter of little surprise that, when the appeal from the order of 20 June 2003 was listed for hearing before this Court in the current session, objection was taken on behalf of the husband. The grounds of objection, set out in a notice dated 6 March 2009, extend over ten paragraphs; but they may be summarised as follows:

- (1) The wife failed to comply with requirements in sections 19(1) and (2) of the Court of Appeal Law (2006 Revision).
- (2) The wife has failed to file her grounds of appeal timeously as required by section 19(5) of that Law; the grounds, as filed, fail to comply with section 20(1) of that Law; and no application for extension of time has been made under section 24 of that Law.
- (3) Having regard to the time which elapsed between 20 June 2003 and 20 November 2008 (almost five and a half years) the appeal should be dismissed for want of prosecution.
- (4) The provisions of the 20 June 2003 order in relation to payment of maintenance to, and the medical expenses of, the wife are now spent and cannot be the subject of an appeal.
- (5) The husband has acted to his detriment in reliance on the 20 June 2003 order and it would now be unfair and inequitable to allow the wife to pursue an appeal from that order.

9. Sections 19(1), (2), (4) and (5) of the Court of Appeal Law are in these terms:

“19(1) In the case of an appeal from any judgment of the Grand Court in the exercise of its civil jurisdiction, the appeal shall be brought by the appellant, within fourteen days after the date of the judgment, lodging with the Registrar and the Clerk of the Grand Court a written notice of appeal and serving personally, or at the place of his dwelling or upon his attorney-at-law such notice upon the opposite party.

(2) The appellant shall, at the time of lodging the notice of appeal required by subsection (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as a Judge of the Grand Court may direct, and such security for costs may be given by the appellant entering into a bond by himself and such sureties and in such sum as the Grand Court may direct, conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the court.

...

(4) Upon the appellant complying with subsections (1) and (2), the Judge of the Grand Court shall draw up, for the information of the Court, a statement of the reasons for the judgment appealed against and such statement shall be lodged with the Registrar who shall give notice thereof to the parties and allow them to peruse and take copies of the same.

(5) The appellant shall, within twenty-one days of receiving the notice provided for in subsection (4), draw up and serve upon the respondent and file with the Registrar a memorandum of the grounds of appeal and, should he fail timeously to do so, his right of appeal shall, subject to section 25, cease and determine."

Section 24 of the Law empowers the Court to extend the time within which (*inter alia*) a memorandum of the grounds of an appeal may be filed or served. Section 25 is in these terms:

"25 The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such a right, and in case any provision of this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed, the Court may, if the justice of the case so requires, with or without terms, admit the appellant to impeach the judgment or proceeding appealed from despite such omission."

10. In the present case there was a failure to serve the husband (or his lawyers) with notice of appeal within fourteen days after the date of the judgment as required by section 19(1): the notice was not sent to them until 22 July 2003, some thirty two days after the order of 20 June 2003. There was a failure to deposit security for the due prosecution of the appeal as required by section 19(2). And there was a failure to serve on the respondent and file with the Registrar within twenty one days after receiving the judge's written judgment (which is dated 20 June 2003) a memorandum of the grounds of appeal.
11. The response on behalf of the wife to the husband's preliminary objection is that, this being an appeal from an order made in matrimonial proceedings before (or at the time of) the dissolution of the marriage, she was not obliged to comply with the provisions in the Court of Appeal Law upon which the husband relies. It is said that section 24 of the Matrimonial Causes Law (2005 Revision) overrides the requirements of section 19 of the Court of Appeal Law and gives the wife an absolute right to appeal notwithstanding that she has failed to comply with those requirements. Section 24 of the Matrimonial Causes Law is in these terms.

“24 Either party to a suit brought under this Law may appeal to the Court of Appeal against any decree or order pronounced or made by the Court in such suit in respect of any matter of law or of mixed fact and law, provided that written notice of appeal is lodged within twenty-one days of the pronouncement of the decree or such notice is given orally in open court at the time of the pronouncement of the decree.”

12. In support of his contention that, having regard to the right of appeal conferred by section 24 of the Matrimonial Causes Law the wife did not need to comply with the requirements of section 19 of the Court of Appeal Law; her counsel referred us to the preliminary ruling of this Court in *Wight v Wight* (CICA No 6 of 2006: 21 November 2006). The question before the Court for preliminary ruling in that case was whether the time for appealing against an order for ancillary relief made before the pronouncement of the decree of dissolution ran from the date of the order or from the date of the decree. The Court held that time ran from the date of the decree. That question does not arise in the present case: the decree was pronounced as the same date as the order appealed from and notice of appeal was filed within fourteen days of that date.
13. It would follow, necessarily, from that decision (i) that the time for filing notice of appeal from an order for ancillary relief made before the pronouncement of the decree of dissolution of the marriage was twenty one days (rather than the fourteen days for which section 19(1) of the Court of Appeal Law provides) and (ii) that leave to appeal is not required in such a case (notwithstanding section 6(f) of the Court of Appeal Law and rule 12(6)(y) of the Court of Appeal Rules (2004 Revision). But I should emphasise that those requirements are varied or abrogated only where the appeal is from an order made before the pronouncement of the decree of dissolution. Appeals from orders varying ancillary relief, made after dissolution of the marriage, are unaffected.
14. The ruling in *Wight v Wight* is not authority for the broad proposition that on an appeal from an order made in matrimonial proceedings an appellant does not need to comply with any of the requirements under section 19 of the Court of Appeal Law. Effect must be given to section 24 of the Matrimonial Causes Law in so far as the provisions of that section are inconsistent with the requirements in section 19 of the Court of Appeal Law and the provisions of the Court of Appeal Rules; but, where

there is no inconsistency, those requirements and those provisions are not overridden. In particular, the ruling in *Wight v Wight* does not entitle the appellant who has filed notice of appeal within the time prescribed by under section 24 of the Matrimonial Causes Law to ignore the requirement that a memorandum of the grounds of appeal must be filed timeously: conversely, the powers of the Court to extend time for the filing of a notice of appeal or of grounds of appeal, conferred by section 24 of the Court of Appeal Law, apply to appeals from orders made in matrimonial proceedings.

15. In the present case, as I have said, Quin & Hampson felt unable to prepare grounds of appeal until the wife's legal aid certificate had been transferred to them. Legal aid was transferred on 19 September 2003. The terms of the renewed certificate expressly extended to the filing of grounds of appeal. Nothing was done, despite the Registrar's reminder by letter dated 13 February 2004 and despite the assurance, in Quin & Hampson's letter of 24 February 2004, that the matter would be concluded shortly. Had Quin & Hampson honoured that assurance – and filed grounds of appeal early in 2004 – it might have been possible to extend time under section 24 of the Court of Appeal Law, in keeping with the spirit of section 25. But that is not this case: no application to extend time has been made: no doubt counsel for the wife appreciated, correctly, that such an application would have no prospect of success. The position in this case, therefore, is that the right of appeal ceased and determined, under section 19(5) of the Court of Appeal Law, on failure to file grounds of appeal within time.

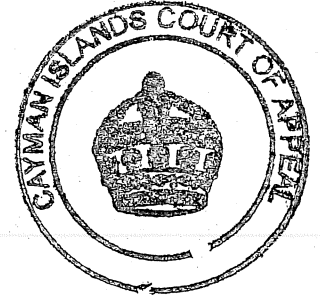
16. I should add that, having regard to the history of the matter since August 2004, I would have taken the view – had it been necessary to decide the point – that this was a case in which the wife should be treated as having abandoned her appeal from the order of 20 June 2003. To permit her to pursue that appeal in circumstances in which, despite numerous opportunities, her intention to do so was not brought to the notice of the Court or to the notice of the husband over a period in excess of four years would be to condone a misuse of the process of these courts.

17. It was for those reasons that I thought it right to uphold the husband's objection.

Chadwick, P.



18. I agree and have nothing to add.



Forte, J.A.

19. I agree that the preliminary objections of the husband should be upheld for the reasons given by the learned President. To allow the appeal to proceed given the time that had elapsed since the order of the court below on 20th June 2003, a period of over five years, would in the circumstances be condoning an abuse of the process of this Court in flagrant breach of the applicable provisions of the Court of Appeal Law and Rules.

Conteh, J.A.

