

COMMONWEALTH OF THE BAHAMAS

2020/APP/sts/No.00015

IN THE SUPREME COURT

Appellate Division

IN THE MATTER OF THE INSURANCE ACT, CHAPTER 347 OF THE REVISED
LAWS OF THE BAHAMAS

BETWEEN

CARLA OUTTEN-MINNIS

Appellant

AND

THE INSURANCE COMMISSION OF THE BAHAMAS

Respondent

Before: Chief Justice Sir Brian M. Moree, Kt.

Appearances: Ms. Dwana Davis with Ms. Palincia Hunter
for the Appellant
Mr. Frederick Smith QC with Mr. R. Dawson Malone and Ms.
Kandice Maycock for the Respondent

R U L I N G

Moree, CJ:

Introduction

[1] This case is an appeal by Ms. Carla Outten-Minns (“*Ms. Outten-Minns*” or “*the Appellant*”) from a decision of the Insurance Commission of The Bahamas (“*the Commission*” or “*the Respondent*”) under section 228 of the Insurance Act (“*the Act*”). I am not dealing with the appeal itself at this time but with three applications which all arose shortly before the scheduled date for the main hearing of the appeal.

- [2] There is a fourth application which I heard on 15 November, 2021 and reserved my decision. I will give my decision on that application in a separate Ruling.
- [3] It is important to limit the scope of this Ruling to only those matters which are necessary to dispose of the three pending applications to avoid trespassing into issues which are properly left for the hearing of the appeal.
- [4] Accordingly, I will only provide a brief summary of the proceedings and the factual background before dealing with the three applications.

Procedural Background

- [5] This case was commenced by the Notice of Originating Motion filed on 29 July, 2020 (*“the Appeal” or “the NOM”*) to appeal *“...the determination of [the Commission] notified to the Appellant by letter dated 28th May, 2020 whereby it proposes to cancel the registration of the Appellant as an Insurance Salesperson effective the 31st day of July, A.D., 2020.”*
- [6] On the same date, 29 July, 2020, the Commission gave an undertaking which was accepted by the Appellant in these terms:
- “While reserving all rights in all respects and without prejudice to any objection procedurally, jurisdictionally or otherwise, the Insurance Commission undertakes not to cancel Carla Outten-Minnis’ registration as an insurance salesperson pending determination of the appeal or upon withdrawal of this undertaking upon 14 days’ notice to Counsel for Carla Outten-Minnis.”**
- [7] Accordingly, the registration of Ms. Outten-Minnis has not been cancelled and at this time she continues to be a registered insurance salesperson under the Act.
- [8] As a result of case management directions by the court, the hearing of the Appeal was fixed for three days in December, 2021.
- [9] At the proverbial eleventh hour, four applications were made which had to be dealt with prior to hearing the Appeal. The first in time was an application by

Summons filed on 13 October, 2021 on behalf of the Appellant seeking to strike out significant parts of the Affidavit of Ms. Lorna Longley-Rolle filed on 30 March, 2021 (“*the Strike out Application*”). The second application was a preliminary point raised at the Bar by counsel for the Commission at the beginning of the hearing on 18 October, 2021 challenging the jurisdiction of the court to hear the Appeal (“*the Preliminary Point*”). The third application was the Summons filed on 18 October, 2021 by the Appellant seeking orders that if it is determined that the filing of the Appeal was out of time under Order 55 rule 4(2) of the Rules of the Supreme Court (“*the RSC*”) (i) any delay in filing the Appeal is an irregularity under the RSC; or in the alternative (ii) an extension of time be granted to file the Appeal (“*the Irregularity/EOT Application*”). The fourth application was the Appellant’s Summons filed on 22 October, 2021 seeking an order to amend the NOM (“*the Amendment Application*”).

[10] I heard the Preliminary Point, the Irregularity/EOT Application and the Amendment Application (collectively “*the Three Applications*”) over three days on 18, 20 and 22 October, 2021 and gave my oral decision on those applications at the hearing on 15 November, 2021 with written reasons to follow. I did not accept the Preliminary Point and held that while the Appeal had been filed out of time, that was an irregularity under the RSC and the Commission had waived the irregularity by taking a fresh step in the proceedings. I granted leave for the Appellant to amend the NOM as sought in the Summons filed 22 October, 2021 save for the proposed new claim for a Declaration which was not allowed. I now give my reasons for those decisions.

[11] Pursuant to my order granting leave to amend the NOM, the Appellant filed the Amended Notice of Originating Motion on 18 November, 2021 and the Appeal will now proceed on the basis of that amended originating document.

Factual Background

- [12] Ms. Outten-Minns is currently a registered insurance salesperson with the Commission under the provisions of the Act. The Commission is an independent regulatory agency with responsibility for regulating all insurance activity in and through The Bahamas.
- [13] The Appellant signed an Agent Agreement with Colina Imperial Insurance Ltd. (“*Colina*”) whereby she was appointed as an Agent of the company effective as of 1 August, 2007. Subsequently, on 4 November, 2016 Colina terminated the appointment for what is termed “lapping.” In her Affidavit filed on 30 March, 2021 Ms. Lorna Longley-Rolle, the internal Legal Counsel of the Commission, defined “lapping” as “...*a fraudulent practice whereby an employee diverts a payment made by one customer to cover a missing payment from another customer.*” Ms. Outten-Minnis stoutly denies that she was involved in “lapping”.
- [14] Based on the information received from Colina relating to the termination of the Agent Agreement with Ms. Outten-Minnis, the Commission launched its own independent investigation into whether the Appellant’s registration as a salesperson should be cancelled. Ultimately, after a period of dealings between the parties with regard to the investigation, the Commission informed the Appellant by letter dated 28 May, 2020 (“*the Cancellation Letter*”) that it had concluded that:
- (i) she had breached section 126(2)(b)(ii) of the Act by carrying on insurance business otherwise than in accordance with sound insurance principles and practices; and
 - (ii) she had demonstrated that she was not a fit and proper person for continued registration as an insurance intermediary pursuant to section 126(2)(b)(vi) of the Act.

The Cancellation Letter stated that for those reasons the Commission proposed to cancel her registration as an insurance salesperson effective 31 July, 2020. It

also stated that at any time prior to 31 July, 2020, the Appellant had the right to submit a written request for the Commission to reconsider its decision stating the reasons why her registration as a salesperson should not be cancelled. Finally, the letter advised Ms. Outten-Minnis of her right of appeal under section 228 of the Act.

[15] Counsel for the Appellant wrote to the Commission on 20 July, 2020 acknowledging receipt of the Cancellation Letter and responding to a number of the matters set out therein. He requested that Ms. Outten-Minnis be provided with the documentary evidence that was relied on by the Commission in coming to its conclusion expressed in the Cancellation Letter that she was “....*carrying on insurance business otherwise than in accordance with sound insurance principles and practices pursuant to s. 126(2)(b)(ii) [of the Act] and that [she was] not a fit and proper person for continued registration as an insurance intermediary pursuant to s. 126(2)(b)(vi) [of the Act.]*” Counsel also requested that no steps be taken to cancel his client’s registration until there is “...*a fair and proper hearing...*” to give her an opportunity to respond to the evidence. The letter concluded by stating that if a response from the Commission was not received within five business days, Ms. Outten-Minnis would commence legal proceedings in the Supreme Court to appeal the “...*the decision to cancel our Client’s Registration as outlined in [the Cancellation letter].*”

[16] The Commission responded to the letter on 27 July, 2020 asserting that its process was fair to Ms. Outten-Minnis and maintaining that she had been provided with “....*all information that the Commission was capable of disclosing.*” The letter notes that a request for a reconsideration had not been made and states that the opportunity to do so remained open until 31 July, 2020.

[17] On 29 July, 2020 the Appellant’s counsel once again wrote to the Commission stating in part that “.....*there is no basis for us to ask for reconsideration as you have not provided us with any new information/evidence that would allow for us*

to provide a different response from that which was already advanced in previous communications.” The letter concluded by stating that legal proceedings would be commenced and the relevant documents would be served on the Commission.

Steps taken in the action

- [18] On the same day, 29 July, 2020, Ms. Outten-Minnis commenced this action by filing the Appeal and her supporting Affidavit.
- [19] The Respondent filed a Memorandum of Appearance on 30 July, 2020 and later filed the Affidavit of Lorna Longley-Rolle on 30 March, 2021 (“*the Longley-Rolle Affidavit*”). In paragraph 1 of that Affidavit Ms. Longley-Rolle states that the Affidavit is “*....in response to the Appellant’s appeal brought by way of Notice of Originating Motion and the supporting Affidavit.....both filed... on July 29, 2020 against the Commission’s decision to cancel her registration as an insurance salesperson.*” Additionally, counsel for the Commission filed on 21 September, 2021 the Notice of Intention to Cross Examine the Appellant.
- [20] A number of Affidavits have been filed on behalf of the Appellant together with numerous Summonses and the Notice of Intention to Cross Examine Ms. Longley Rolle.
- [21] In preparation for the hearing of the Appeal, counsel for each of the parties delivered to the court full written submissions. It is noteworthy that those submissions do not raise, foreshadow or in any other way address any of the issues subsequently raised in the Three Applications.
- [22] On 13 October, 2021 the Appellant filed the Strike out Application under Order 41 rule 5 and rule 6 of the RSC. The Affidavit of Krystian Butler filed on 18 October, 2021 supports that application and seeks to explain the delay in making the application. On 15 October, 2021 the Respondent filed a document headed ‘Respondent’s Notice of Objection’ setting out the basis for the submission by

counsel for the Commission that the court should not hear the Strike out Application.

[23] There was more to come. At the beginning of the hearing on 18 October, 2021 counsel for the Commission advanced the Preliminary Point which he contended raised an issue going to the jurisdiction of the court to hear the Appeal. The point had not been previously raised in these proceedings. The Irregularity/EOT Application was foreshadowed by counsel for the Appellant during the hearing on 18 October, 2021 and filed later that day. The Amendment Application by the Appellant was filed on 22 October, 2021 seeking to amend the Appeal.

I. The Preliminary Point

[24] Mr. Smith submitted that the time period for filing an appeal from a decision of the Commission is governed by Order 55 rule 4(2) of the RSC. He contended that this provision is mandatory and an appeal filed in breach thereof is a nullity unless an extension of time is granted. Counsel submitted that this goes to the root of the jurisdiction of the court to hear the Appeal.

[25] Section 228 of the Act provides that:

“Any person aggrieved by a decision of the Commission on any matter pursuant to this Act may appeal to the Supreme Court in accordance with rules of Court.”

[26] The applicable rules of court under section 228 are the Rules of the Supreme Court and specifically Order 55 rule 4(2) which provides that:

“The notice must be served, and the appeal entered, within 28 days after the date of the judgment, order, determination or other decision against which the appeal is brought.”

[27] The Cancellation Letter is exhibited to the Longley-Rolle Affidavit at pages 143-145. Mr. Smith contended that the Appellant is appealing the decision of the Commission set out in that letter. Therefore, based on the above provision, counsel submitted that the Appeal had to be filed within 28 days of the date of the Cancellation Letter. That would have been 25 June, 2020. In fact, the Appeal

was filed on 29 July, 2020 and consequently Mr. Smith submitted that it is axiomatic that it was out of time and is therefore a nullity. In any event, he contended that the filing of the Irregularity/EOT Application by the Appellant was an admission by her that the Appeal is out of time and that was dispositive of the point.

[28] He cited the cases of *Junkanoo Estate Ltd and Others v UBS Bahamas Ltd (in Voluntary Liquidation) (Bahamas) [2017] UKPC 8* and *Peter Nygard v The Right Honourable Perry G. Christie etal SCCivApp 168 of 2018* in support of his contention that an appeal filed in breach of mandatory provisions is a nullity.

[29] To the extent that the Appellant was seeking to rely on the Irregularity/EOT Application and/or the Amendment Application to answer the Preliminary Point, Mr. Smith urged the court to reject both applications. In the result, Mr. Smith submitted that the court should accept the Preliminary Point and dismiss the Appeal at this stage without a full hearing on the merits.

[30] Counsel for the Appellant, Ms. Davis, deployed three alternative submissions in opposing the Preliminary Point. First, she submitted that the Appeal is not out of time and therefore the Preliminary Point is still born. She referred to Order 55 rule 3 which provides that:

“The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment.”

Bearing this in mind, counsel contended that the 28 day period in Order 55 rule 4(2) must give way to any time period fixed by the Commission under section 126(3) of the Act. That sections reads as follows:

“Where the Commission has notified any insurance intermediary that it proposes to cancel the registration of such insurance intermediary, and of its right to appeal, it may give the insurance intermediary up to sixty days to process such appeal before taking further action.”

- [31] Ms. Davis submitted that under the Cancellation Letter, the Commission extended the time for an appeal to 31 July, 2020. She submitted that this extension, presumably given by the Commission under section 126(3) of the Act, operated to displace the 28 day period in Order 55 rule 4(2) of the RSC. Accordingly, it was contended that the Appellant had until 31 July, 2020 to file an appeal. As the Appeal was filed on 29 July, 2020, counsel submitted that it is not out of time.
- [32] In the alternative, counsel contended that '*the effective date of the decision of the [Commission] is 29 July, 2020*' when counsel for the Appellant informed the Commission by letter that his client had elected to appeal to the Supreme Court as opposed to seeking a reconsideration by the Commission. The letter relied on by counsel is exhibited to the Longley-Rolle Affidavit at pages 175-176. On this basis the Appeal would not be out of time as it was filed on 29 July, 2020, the same date that the decision which is the subject of the Appeal was "*effective.*"
- [33] Additionally, Ms. Davis did not accept that the filing of the Irregularity/EOT Application was an admission by the Appellant that the Appeal was out of time. Rather, she contended that it was filed in the alternative to her primary submission that the Appeal was filed within the relevant time period.
- [34] Secondly and in the alternative, counsel contended that if the Appeal is out of time (which was not conceded) that would not result in a nullity but would be an irregularity under Order 2 rule 1 of the RSC and would have been waived by the Respondent under Order 2 r 2 when it took a fresh step in the proceedings.
- [35] Thirdly, if the first two submissions are not accepted by the court, Ms. Davis relied on the application for an extension of time under Order 3 rule 4(2) of the RSC and the Amendment Application under Order 20 rules 5 and 6 on the basis that if granted, they would be a complete answer to the Preliminary Point.

(i) Is the Appeal out of time?

[36] After conducting its independent investigation into the matters relating to the termination of the Appellant's Agent Agreement with Colina, the Commission, acting under section 126 of the Act, made a decision to propose the cancellation of the Appellant's registration as an insurance salesperson effective 31 July, 2020 ("*the Decision*"). The Decision was based on "...*the view...*" formed by the Commission that the Appellant (i) had breached section 126(2)(b)(ii) of the Act by carrying on insurance business otherwise than in accordance with sound insurance principles and practices; and (ii) had demonstrated that she was not a fit and proper person for continued registration as an insurance intermediary pursuant to section 126(2)(b)(vi) of the Act.

[37] Pursuant to section 126(1) of the Act, the Commission sent to the Appellant the Cancellation Letter notifying her of the Decision and the reasons which led to the Decision. That section reads:

"Subject to the Commission's power to cancel summarily under section 128, the Commission may, for any of the reasons mentioned in subsection (2), notify in writing an insurance intermediary that it proposes to cancel the insurance intermediary's registration, giving its reasons for so doing, and notifying the insurance intermediary of his rights of appeal to the Commission for reconsideration under section 228."

I observe in passing that the right of appeal under section 228 of the Act relates only to an appeal to the Supreme Court and not to an "*appeal to the Commission for reconsideration*". Consequently the reference to that section at the end of section 126(1) is, *ex facie*, anomalous.

[38] It is pellucid that the target of this Appeal is the Decision. In the first paragraph of the NOM it states that:

"....the Supreme Courtwill be moved as soon as Counsel can be heard on behalf of theAppellant on appeal from the determination of the [Commission] notified to the Appellant by

[the Cancellation Letter] whereby it proposes to cancel the registration of the Appellant as an Insurance Salesperson effective the 31st day of July, A.D., 2020.”

[39] This is also clear from the grounds of the Appeal set out in the NOM which impugn the Decision and its reasons based on breaches of section 126(2)(b)(ii) and section 126(2)(b)(vi) of the Act.

[40] Further, the Amended Notice of Originating Motion filed on 18 November, 2021 seeks an order to specifically set aside the Decision.

[41] Also, in the letter from the Appellant’s counsel to the Commission dated 20 July, 2020, which is exhibited to the Longley-Rolle Affidavit at pages 146-149, he states that:

“If we do not hear from you within five business days we are instructed to commence legal proceedings in the Supreme Court appealing the decision to cancel [the Appellant’s] Registration as outlined in [the Cancellation Letter].”

[42] According to the Third Affidavit of the Appellant filed on 19 October, 2021 she received the Cancellation Letter notifying her of the Decision (with reasons) on 8 June, 2020 (the date is incorrectly stated to be 2021), eleven days after the date of that letter.

[43] In this factual context, what was the deadline for filing an appeal of the Decision to the Supreme Court?

[44] In my view the answer is found in section 228 of the Act and Order 55 rule 4(2) of the RSC. Under those provisions the period for appealing to the Supreme Court is within 28 days after the date of the Decision.

[45] In calculating this time period I must have regard to Order 55 rule 4(4) of the RSC which provides that:

“In the case of an appeal against an order, determination, award or other decision of a tribunal, Minister, government department or other person, the period specified in paragraph (2) [i.e. 28 days after the date of the judgment, order, determination or other decision against which the appeal is brought] shall be calculated from the date on which notice of the decision was given to the appellant by the person who made the decision or by a person authorised in that behalf to do so.”

[46] Notice of the Decision was given on 28 May, 2020 and received by the Appellant on 8 June, 2020. Assuming that the operative date under Order 55 rule 4(4) is when the Appellant received the notification of the Decision, the Appeal would be out of time having been filed on 29 July, 2020. That was several weeks after the expiration of the 28 day period.

[47] I do not accept the submission by counsel for the Appellant that the Commission extended the time for appealing the Decision to the Supreme Court to 31 July, 2020 under section 126(3) of the Act (as engaged through Order 55 rule 3 of the RSC) thereby displacing the 28 day period under Order 55 rule 4(2).

[48] In my view, the Cancellation Letter does not support that submission. In the penultimate paragraph of that letter the Commission states that the Appellant has “...*the right to ask the Commission to reconsider its decision and may do so at any time up to close of business on Friday, July 31, 2020.*” That was not a reference to an appeal to the Supreme Court under section 228 of the Act but to the right of appeal to the Commission for reconsideration under section 126. I have found no evidence in the Affidavits stating or even suggesting that the Commission extended, or sought to extend, the 28 day period established in Order 55 rule 4(2) of the RSC for filing the Appeal.

[49] It is noteworthy that in the very next paragraph of the Cancellation Letter after dealing with the right to request a reconsideration, the Commission specifically refers to the right of appeal to the Supreme Court under section 228 of the Act.

It reads “*You are **also** notified of your right to appeal to the Supreme Court pursuant to section 228 [of the] Insurance Act.*” [my emphasis]. This fortifies my view that the Cancellation Letter was making a clear distinction between the right of appeal to the Commission for a reconsideration on the one hand and an appeal to the Supreme Court on the other hand.

[50] I see no basis to conflate the right of appeal to the Commission for a reconsideration with the right of appeal to the Supreme Court. These are separate and distinct procedures and there is no evidence to suggest that the Commission sought to extend the time for appealing to the Supreme Court under section 228.

[51] Additionally, the reference to the ‘right of appeal’ in section 126(3) of the Act must be construed in the context of the other provisions of section 126 and also section 127. In section 126(1) the reference to the ‘right of appeal’ is expressly in connection with an appeal to the Commission for reconsideration – not an appeal to the Supreme Court. Similarly, section 127 refers to a request to the Commission to reconsider its decision – not an appeal to the Supreme Court. This suggests to me that the use of the term “*its right to appeal*” in section 126(3) is to be given a similar meaning.

[52] It is in my view tolerably clear that when section 126(3) of the Act provides that the Commission “*....may give the insurance intermediary up to sixty days **to process such appeal** before taking further action*” it is referring to an appeal to the Commission for reconsideration under section 126(1). I have already indicated my view that the reference in that section to section 228 appears to be anomalous as, by its terms, section 228 only relates to an appeal to the Supreme Court.

[53] Also, section 126(3) of the Act refers to a sixty day period “*....to process...*” an appeal. This would seem to imply that such period is not intended to merely require an appeal to be filed within that time but contemplates some further action in respect of the appeal. However, it is not necessary for me to further

consider this issue in order to dispose of the Preliminary Point and I express no final view on this point and place no reliance on it in coming to my decision on the Preliminary Point.

[54] Ms. Davis submitted in the alternative that the effective date of the Decision is 29 July, 2020 and therefore, even if the time period for appealing is 28 days under Order 55 rule 4(2) (which she did not accept), the Appeal was filed in time. I understood the gravamen of this submission to be that the date for filing the Appeal did not start to run until the Appellant had made her election to appeal to the Supreme Court as opposed to seeking a reconsideration by the Commission. This was communicated to the Commission by counsel for the Appellant in his letters dated 20 July, 2020 and 29 July, 2020 respectively which are exhibited to the Longley-Rolle Affidavit at pages 146 – 149 and 175-176. In advancing this submission Ms. Davis relied on section 126 of the Act and the Cancellation Letter. It seems to me that this submission is based more on expediency than principle.

[55] I concluded in paragraph 47 of this Ruling that the Commission did not extend the time period for appealing to the Supreme Court under Order 55 4 (2) of the RSC. Therefore, section 126 (3) of the Act is of no assistance to the Appellant in advancing this alternative submission.

[56] Under the Cancellation Letter, notice of the Decision was given to the Appellant on 28 May, 2020. According to her evidence, she received that letter on 8 June, 2020. At that time the Appellant had three options; (i) she could take no action thereby accepting the Decision of the Commission; or (ii) she could exercise her right to appeal to the Commission for reconsideration of the Decision; or (iii) she could exercise her right to appeal the Decision to the Supreme Court in accordance with the RSC. If she had elected the second option to appeal to the Commission, the Appellant would have had sixty days to *'process'* the appeal before any further action would have been taken in connection with the Decision. As it transpired, the Appellant elected the third option and therefore she was

required to pursue the appeal to the Supreme Court *'in accordance with'* the relevant rules of court. I have set out above those rules and my conclusions on the application thereof to this case. I see no basis for conflating option two with option three (and their respective procedures) or for holding that the time for appealing to the Supreme Court under the third option only started to run after the Appellant made her election between the options. That is inconsistent with the provisions of Order 55 rule 4(4) of the RSC which applies to the calculation of the 28 day period applicable to an appeal to the Supreme Court.

[57] In my view, if the Appellant wanted to appeal the Decision to the Supreme Court she was required to do so within the timeline set out in Order 55 of the RSC subject to a court order to extend that period under Order 3 rule 4 of the RSC. Such an appeal would obviously make redundant an appeal to the Commission for a reconsideration. Alternatively, if the Appellant had elected to appeal to the Commission for reconsideration of the Decision that would have proceeded and in the event that the outcome would have been adverse to the Appellant she could have had recourse to her right of appeal to the Supreme Court under section 228 of the Act in respect of the decision on the reconsideration.

[58] I reject the submission that the time for appealing the Decision to the Supreme Court only began to run on 29 July, 2020 on the basis that such date was the 'effective date' of the Decision. That date is unconnected to the time line set out in Order 55 rule 4 (2) & (4). In any event, time for filing an appeal to the Supreme Court under section 228 of the Act is triggered by the date on which notice of the decision is received by the appellant, not by the so called 'effective date' of the decision.

[59] Finally on this point, I do not accept the submission by Mr. Smith QC that the filing of the Irregularity/EOT Application was an admission by the Appellant that the Appeal was filed out of time. In my view, that application was filed in the alternative to the submission by Ms. Davis that the Appeal was, in fact, filed

in time and it was entirely appropriate for the application to have been made in the event that the primary submission was rejected.

[60] Therefore, for the reasons set out above, I have concluded that the Appeal was filed out of time.

(ii) What is the effect of the Appeal having been filed out of time?

[61] I do not accept the submission by counsel for the Commission that an appeal filed under section 228 of the Act is a nullity if it is filed out of time. That section expressly provides that the appeal is to be in accordance with rules of court which engages the provisions of the RSC. Under Order 55 rule 4 (2) the appeal must be filed within 28 days after the date of the decision against which the appeal is brought calculated pursuant to Order 55 rule 4 (4). Mr. Smith contends that these are mandatory provisions. However, notwithstanding the use of the ‘*must*’ in Order 55 rule 4(2) that provision must be read in light of Order 2 of the RSC. That Order reads:

“1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by

any of these Rules to be begun by an originating process other than the one employed.

2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”

[62] This Order specifically provides that the failure to comply with the requirements of the RSC (which, of course, includes Order 55) in respect of, *inter alia*, time is an irregularity and not a nullity. I have held that the Appeal was filed out of time under Order 55 and, in my view, when considering that Order in conjunction with Order 2 rule 1, this is an irregularity.

[63] Mr. Smith relied on the cases of *Junkanoo Estate Ltd and Others v UBS Bahamas Ltd (in Voluntary Liquidation) (Bahamas) [2017] UKPC 8* and *Peter Nygard v The Right Honourable Perry G. Christie et al SCCivApp 168 of 2018* to support his submission that the Appeal is a nullity as a result of the failure of the Appellant to comply with the mandatory provisions of Order 55 of the RSC.

[64] The issue of nullity arose in both of those cases with regard to an appeal filed without obtaining the requisite leave under section 11 of the Court of Appeal Act and Rule 27 of the Court of Appeal Rules. I did not find those cases helpful on the issue before me as neither involved the consideration of a provision similar to Order 2 of the RSC. In the context of the applicable statutory framework relating to appeals, there was no basis, and indeed no submission by counsel in those two cases, to treat the failure to obtain the requisite leave as an irregularity as opposed to a nullity. Under the Court of Appeal Act, leave to appeal in the cases covered by section 11 is mandatory and is the gateway to a competent

appeal in those cases. It is not subject to a provision akin in any way to Order 2 of the RSC.

II. The Irregularity/EOT Application

[65] Having regard to my decision that the filing of the Appeal out of time was an irregularity I must consider the impact of Order 2 rule 2.

[66] The Appeal was filed on 29 July, 2020. The Preliminary Point relating to the late filing of the Appeal was taken by the Commission for the first time at the court hearing on 18 October, 2021. That is almost fifteen months after the irregularity. By that date the Commission had filed a Memorandum of Appearance, the Longley-Rolle Affidavit and the Notice of Intention to Cross Examine the Appellant. It had also filed its Trial Submissions. All these steps taken by the Commission would have occurred after it was aware that the Appeal had been filed outside the time period prescribed by Order 55 of the RSC.

[67] In the English Supreme Court Practice (commonly referred to as The White Book) the notes under Order 2 rule 2 read in part as follows:

“A fresh step for the purpose of this Rule is one sufficient to constitute a waiver of the irregularity. In order to establish a waiver you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained.

Thus the entry of an unconditional appearance will waive: (a) any objection to the jurisdiction of the Court....; (b) an irregularity in the commencement or service of the proceedings.....

Similarly other steps taken, with knowledge of an irregularity, either with a view of defending the case on the merits...or to obtain an advantage such as security for costs....will waive irregularities in the institution of service of proceedings, since they could only usefully be taken on the basis that the proceedings were valid.

But steps reasonably taken to assert an objection cannot amount to waiver of it.....”

[68] There is no doubt that the Commission has taken a fresh step (or indeed several such steps) since the Appeal was filed. Accordingly, the provisions of Order 2

rule 2 are engaged and the Commission is not now allowed to apply to set aside the Appeal for the irregularity arising from the late filing of the Appeal. In these circumstances, it is not necessary for me to consider the application for an extension of time.

The Amendment Application

[69] The Appellant sought an Order to amend the NOM in line with the draft Amended Notice of Original Motion which is attached to the Summons filed 22 October, 2021. The substance of those amendments related to the Orders which were sought in the NOM. The target of the Appeal and the grounds of appeal both contained in the NOM were not significantly affected by the proposed amendments.

[70] Initially the NOM sought (i) an Order that “*the Respondent...unconditionally register the Appellant as an insurance sales person pursuant to section 123(1) of the Insurance Act...*”; (ii) “*a stay of the proposed Order cancelling the Appellant’s registration;* and (iii) costs. Under the proposed amendments the first Order was deleted and replaced by an Order “*....that the proposal made by the Respondent to cancel the Applicant’s registration as an insurance intermediary as communicated by letter dated 28th May, 2020 whereby it proposes to cancel the registration of the Applicant as an insurance salesperson effective the 31st day of July, A.D. 2020 be set aside.*” The other proposed amendments are minor.

[71] Ms. Davis relied on Order 20 rules 5 & 6 of the RSC to support the application and I also had regard to Order 55 rule 6 (3)&(4) when considering the Amendment Application.

[72] Order 20 rules 5, 6 and 7 provide that:

“5. (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or

otherwise as may be just and in such manner (if any) as it may direct.

(2)

(3)

(4)

(5)

6. Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a writ.

7. (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

[73] Order 55 rule 6 (3)&(4) state that:

“(3) Except with the leave of the Court, no grounds other than those stated in the notice of the motion by which the appeal is brought or any supplementary notice under paragraph (1) may be relied upon by the appellant at the hearing; but that Court may amend the grounds so stated or make any other order, on such terms as it thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(4) The foregoing provisions of this rule are without prejudice to the powers of the Court under Order 20.”

[74] The case of *Bahamas Telecommunications Company Limited v Island Bell Limited 188/2014* is instructive on the issue of amendments. In that case the Court of Appeal of The Bahamas set aside the decision of the trial judge allowing amendments to the Statement of Claim during the course of the trial. In doing so the Court considered a number of the authorities on the court’s approach to amendments including the case of *Cropper v Smith (1883) 26 Ch D. 700* where Bowen L.J. summarized the general principles for granting leave to amend in these terms:

“It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them

for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters of controversy, and I do not regard such amendment as a matter of favour or grace...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.”

[75] I am reminded of what the Court of Appeal stated in the *Island Bell* case in paragraph 26 of its Judgment that:

“[t]he application of the above general principle [as stated in Cropper] is also subject however to the other side of the coin, namely, the admonition of Lord Griffiths in *Kettman v Hansel Properties* [1987] A.C. 189, that there is a clear difference between allowing amendments to clarify the issues in dispute, and those that allow distinct defences or claims to be raised for the first time.”

[76] I had these principles in mind when considering the Amendment Application. I also bore in mind that the proposed amendments should only be allowed if they could be made without injustice. In determining whether there is injustice, I considered the lateness of the application; the sufficiency of the reasons for the late application; whether a fair trial and the determination of the issues would be compromised by the granting of leave; and whether costs would compensate.

[77] The proposed amendments did not change in a material way the substance or nature of the Appeal. It was at the outset an appeal of the Decision in order to set it aside and the proposed amendments did not change that position. Significantly, the grounds of appeal did not materially change.

[78] I regarded the proposed amendments as consistent with determining the real question in controversy between the parties; that is whether the Decision should be set aside and I saw no injustice in acceding to the application. In my view the

application was not so late as to jeopardize the date of the trial and I was satisfied that the amendments would not compromise the fair trial and determination of the issues in this case. Accordingly, I granted leave to amend the NOM in the terms of the Amended Notice of Originating Motion filed on 18 November, 2021 with costs of the application to the Commission to be taxed if not agreed.

Conclusion

[79] The Preliminary Point is dismissed with costs to the Appellant to be taxed if not agreed. In coming to this conclusion, I held that the Appeal was filed out of time and that this was an irregularity under the RSC which could not be challenged by the Commission as it had taken a fresh step in this action after being aware of the irregularity. In these circumstances, I did not find it necessary to consider the application for an extension of time and I will hear counsel on the costs of the Irregularity/EOT Application.

[80] I granted the Amendment Application with costs to the Commission to be taxed if not agreed.

Dated 14 December, 2021

Sir Brian M. Moree Kt. QC
Chief Justice