[1980–87 Gib LR 193]

ZARB v. PRATA LIMITED

COURT OF APPEAL (Spry, P., Blair-Kerr and Briggs, JJ.A): March 24th, 1984

Courts—Court of Appeal—single judge of Court of Appeal—under Gibraltar Court of Appeal Ordinance (cap. 170), s.9, full Court of Appeal only to interfere with decision of single judge refusing extension of time to appeal in civil case if exercise of discretion wrong in law or principle—in criminal case, full Court of Appeal may consider application de novo under s.16

The applicant applied to the Supreme Court for judicial review of the determination of his rent by the Rent Assessment Tribunal.

The applicant was dissatisfied with the decision of the Supreme Court (Pizzarello, Ag. A.J.) and wished to appeal but did not file notice of appeal in time. He applied to a single judge of the Court of Appeal for an extension of time, which was refused on the ground that mere inadvertence, without more, was an insufficient reason to exercise discretion in favour of the applicant. The applicant then applied to the full Court of Appeal.

He submitted that (a) the notice of appeal was only out of time by a very short period; (b) an "unfortunate slip" on the part of his solicitor should be accepted by the court as a sufficient reason to exercise its discretion to extend time; and (c) the court could substitute its own opinion for that of the single judge as it was to be concerned with the exercise of a judicial discretion.

The respondent submitted that the full Court of Appeal should regard itself as acting in an appellate capacity, concerning itself only with the question of whether the single judge erred in the exercise of his discretion and intervening only if it was found that he had in fact erred in his decision refusing an extension of time in which to appeal.

Held, dismissing the application:

It was not necessary to interfere with the decision of the single judge, who had made no error of law or principle. The full Court of Appeal, by virtue of the Gibraltar Court of Appeal Ordinance, s.9, sat in an appellate capacity in relation to civil matters and could only interfere if it were satisfied that the single judge had exercised his discretion wrongly as a matter of law or principle. This was different from criminal matters, dealt with in the Ordinance under s.16, in which the applicant would have had

the benefit of having his application reconsidered afresh by the full Court of Appeal (paras. 5–10).

Case cited:
(1) *Gatti* v. *Shoosmith*, [1939] Ch. 841; [1939] 3 All E.R. 916, considered.

Legislation construed:
Gibraltar Court of Appeal Ordinance (Laws of Gibraltar, *cap*. 170), s.9: The relevant terms of this section are set out at para. 4.
s.16: The relevant terms of this section are set out at para. 6.

J.J. Neish for the applicant;
Sir Joshua Hassan, *Q.C.* and *P. Montegriffo* for the respondent.

1 **SPRY, P.,** delivering the judgment of the court: The applicant is the owner and the respondent, the tenant, of certain premises which are subject to the provisions of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. In relation to these premises, the respondent appealed to the Rent Assessment Tribunal. The applicant was dissatisfied with the decision of the Tribunal and sought relief by way of an application for judicial review. This was heard by Pizzarello, Ag. A.J., against whose decision the applicant decided to appeal. Unfortunately, due to circumstances into which it is unnecessary to go, no notice of appeal was filed in time. The applicant applied to the learned Chief Justice, as an *ex officio* judge of this court, for an extension of time but this was refused, the Chief Justice holding that in all the circumstances of the case, mere inadvertence, without more, was not a sufficient ground for the exercise of his discretion. The applicant now comes to the full court.

2 Sir Joshua Hassan, Q.C., appearing with Mr. Montegriffo for the applicant, has argued that this is a simple matter of the exercise of discretion. He relied on *Gatti* v. *Shoosmith* (1) as authority for saying that "an unfortunate slip" on the part of a lawyer may be accepted by the court as sufficient reason for the exercise of discretion and he stressed that when he began to move for an extension, he was only out of time by a very short period.

3 Mr. Neish, who appeared for the respondent, submitted, among other arguments, that this court should regard itself as acting in an appellate capacity. This, I think, is the real issue in this case. If, as Sir Joshua argues, we are only concerned with considering whether to exercise discretion, we might substitute our own opinions for those of the Chief Justice but if, as Mr. Neish argues, we are sitting on appeal, we are only concerned with the question whether the Chief Justice erred in the exercise of his discretion and if we concluded that he had not erred, we should not consider ourselves entitled to substitute our opinions for his.

4 This calls for examination of s.9 of the Gibraltar Court of Appeal Ordinance. That section, which falls within the Part relating to appeals in civil cases, provides that the power of the court to hear any interlocutory matter may be exercised by a single judge and there is a proviso which reads:

> "Provided that every order made by a single judge of the Court of Appeal in pursuance of this section may, on the application of the aggrieved party and subject to compliance with any procedure prescribed by rules, be discharged or varied by the Court of Appeal as duly constituted for the hearing and determination of appeals."

5 The words "discharged or varied" appear to indicate an appellate function.

6 Any possible doubt disappears, I think, if s.9 is compared with s.16, the corresponding provision in the Part relating to appeals in criminal cases. In s.16, the following words correspond with s.9:

> "But if the judge of the Court of Appeal refuses an application made under this section, the person aggrieved by such refusal shall be entitled to have the application determined by the Court of Appeal as duly constituted for the hearing and determining of appeals."

7 That is clearly a re-hearing of the application.

8 The use of these very different formulae is clearly deliberate and it would appear that the legislature decided that in criminal matters, where the liberty of the individual might be at stake, an applicant should have the benefit of having his application reconsidered; whereas in civil matters, he was only given the limited protection that is afforded by a right of appeal from the exercise of a discretion.

9 I think therefore that we ought to approach this application as if it were an appeal and that we should only interfere if we are satisfied that the Chief Justice was wrong. For my part, while I might well, had I been the single judge, have given a different decision, I am not prepared to say that the Chief Justice erred in law or in principle. It was one of those situations where a judge considering the matter fairly might have decided either way.

10 I would dismiss the application.

Application dismissed.
