GRECIAN INVESTMENTS (GIBRALTAR) LIMITED v. BARLOW and ROBINSON

SUPREME COURT (Kneller, C.J.): February 22nd, 1993

Employment—Industrial Tribunal—appeals—notice of appeal—employer required to file separate notice against each employee obtaining judgment

Employment—Industrial Tribunal—appeals—extension of time—under Supreme Court Rules, r.5(1) Supreme Court may extend time for filing record of appeal—applicant to file affidavit of reasons for delay and satisfy court of arguable grounds

The respondents brought proceedings in the Industrial Tribunal in connection with their dismissal from the appellant's employment.

The respondents were awarded compensation for their wrongful dismissal by the appellant. The appellant then filed a single notice of appeal against the judgments in favour of the respondents, within the 14-day period allowed for doing so under r.4 of the Industrial Tribunal (Appeals) Rules. It then applied unsuccessfully for a stay of execution. The application was heard some months after the Tribunal's awards. The appellant applied for an extension of time in which to file its record of appeal required by r.5. Meanwhile, the respondents obtained charging orders in the Court of First Instance against the appellant. At the hearing of the appellant's application the transcript of the Tribunal's proceedings had not yet been prepared.

The appellant submitted that (a) it had properly filed a single notice of appeal, since the issues of fact and law involved were the same in each case and the cases had been dealt with together by the Tribunal; (b) the court had power to grant an extension of time even though the Industrial Tribunal (Appeals) Rules included no such provision, since (i) by r.6, the rules governing appeals from the Court of First Instance to the Supreme Court were to be applied in absence of a relevant provision, (ii) under r.5(1) of the Supreme Court Rules, the court could extend the time limited for any act and could do so after the expiry of the prescribed limit, and (iii) under s.46 of the Court of First Instance Ordinance, the court could entertain an appeal from that court on any terms it thought just; and (c) since the transcript was needed to comply with the rules and would not be available for some time (a matter beyond its control), it was entitled to an extension of time in which to file the record of appeal.

The respondents submitted in reply that (a) the notice of appeal was defective, since a separate notice of appeal was required in respect of

each respondent; (b) the court had no power to extend the time allowed for filing the record of appeal, since r.5 of the Industrial Tribunal (Appeals) Rules setting the time limit was mandatory, and neither r.6 of those rules nor rr. 17 to 28 of the Supreme Court Rules dealing with appeals from the Court of First Instance contained provision for extension; and (c) alternatively, it had a discretion only if the appellant (i) had proceeded with expedition, which it had not, no attempt having been made to hurry along the preparation of the transcript in the six months since the Tribunal's awards, and (ii) had a good chance of success on appeal.

Held, dismissing the application:

(1) The appellant should have filed two notices of appeal; one in respect of each respondent in favour of whom the Industrial Tribunal had given judgment, and each setting out the grounds of appeal (page 20, line 3).

(2) The court had a discretion, under r.5(1) of the Supreme Court Rules, to extend the time permitted for the filing of the record of appeal, since r.6 of the Industrial Tribunal (Appeals) Rules provided that in the absence of provision there, the rules governing appeals from the Court of First Instance were to apply, and rr. 17 to 28 of the Supreme Court Rules did not cover that aspect of appeal. An application could be made before or after the expiry of the time limit in r.5 of the Industrial Tribunal (Appeals) Rules. The applicant was obliged to explain, by affidavit evidence, the delay in complying with the prescribed time-scale and also to show that it had arguable grounds for its appeal. Since the appellant's notice of appeal and affidavit disclosed no such grounds, its application would be dismissed (page 20, line 37 – page 22, line 23).

Legislation construed:

Court of First Instance Ordinance (1984 Edition), s.45: The relevant terms of this section are set out at page 21, lines 1–6.

s.46: The relevant terms of this section are set out at page 21, lines 7–10.

Employment Ordinance (1984 Edition), s.88:

> "The Chief Justice may make rules providing for the hearing of appeals from the Industrial Tribunal, and … such rules may prescribe the form in which appeals to the Supreme Court are to be made."

Industrial Tribunal (Appeals) Rules, r.2: The relevant terms of this rule are set out at page 20, lines 17–21.

r.3: The relevant terms of this rule are set out at page 20, lines 24–25.

r.4: The relevant terms of this rule are set out at page 20, lines 26–28.

r.5: The relevant terms of this rule are set out at page 20, lines 30–37.

r.6: The relevant terms of this rule are set out at page 20, lines 41–43.

Supreme Court Rules, r.5(1): The relevant terms of this sub-rule are set out at page 21, lines 14–16.
r.5(2): The relevant terms of this sub-rule are set out at page 21 lines 17–19.
r.19(1): "As soon as is practicable after receiving the notice of appeal under rule 18(1), the Clerk of the Court of First Instance shall prepare the record of appeal…"
r.35: The relevant terms of this rule are set out at page 21, lines 23–30.

L.E.C. Baglietto for the appellant;
J.M.P. Nuñez for the respondents.

KNELLER, C.J.: I have before me a summons in chambers by the appellant company dated January 28th, 1993, pursuant to r.5 of the Supreme Court Rules, for an extension of time for filing the record of appeal in this matter and for directions as to the lodging of the memorandum of appeal and any other directions the court may think fit to make in relation to this appeal. The respondents oppose the application.

There is also an affidavit in support, dated January 6th of this year, by the counsel who had the conduct of the proceedings in the Industrial Tribunal on the appellant's behalf and who is also conducting the intended appeal. This discloses that on July 23rd, 1992, the Chairman of the Industrial Tribunal adjudged that the appellant should pay to each of the respondents the sum of £10,029.55. The appellant's counsel was away from Gibraltar at the time but on his return he took instructions and filed a notice of appeal and an application for a stay of execution of the judgment pending the appeal.

The chronology of all this is as follows: On July 7th, 1991 the respondents were dismissed summarily by the appellant and on August 16th they filed their complaints in the Tribunal's registry. The complaints were dealt with by the Industrial Tribunal over the course of six sessions, either in the morning or in the afternoon during the month of May 1992. Judgment was delivered, as we have heard, on July 23rd, and the appellant's notice of appeal was filed on August 6th.

The appellant applied for a stay of execution on August 12th but Pizzarello, A.J. refused that application on various procedural grounds and the respondents entered their judgments in the Court of First Instance on October 8th. The application for a stay was heard and dismissed by Pizzarello, A.J. on January 11th, 1993. Then came the filing of the appellant's summons of January 28th, with which I am now dealing. The respondents obtained charging orders *nisi* from the Court of First Instance on February 4th, 1993. On February 8th, this summons was heard.

The appellant's counsel began his submissions by indicating that under the Industrial Tribunal (Appeals) Rules, the appellant had 14 days for filing and serving its notice of appeal after the delivery of judgment.

Thereafter it had another 24 days in which to file a record of appeal including the notice of appeal, a copy of the judgment, an outline of the representations and a record of the evidence which was taken by the Tribunal. The proceedings are tape-recorded in the Tribunal and then transcripts are prepared, but these take months to do because the work is done by the staff of the Department of Labour and Social Security and they have much other work to do. A transcript, however, is an integral part of the appeal and it is impossible to comply with the rules without it.

Mr. Baglietto, for the appellant, acknowledged that there were two cases before the Tribunal because there were two different members of the appellant's staff dismissed, but in matters of law the cases were identical and, by agreement, evidence in the one counted as evidence in the other and the same went for the submissions and the judgment.

On February 8th, 1993 when this summons was heard, the transcript was still not ready and that is why an extension of the time for filing the record of appeal was sought.

Mr. Nuñez, for the respondents, submitted that there had been a string of procedural errors which effectively barred the court from granting the indulgence sought. The first was that the application was not supported by an affidavit, to which Mr. Baglietto replied that the reason for applying for more time was quite clear and no affidavit was necessary. Nevertheless, the appellant was ordered to file and serve within 10 days an affidavit of reasons for the delay, which was accomplished.

Mr. Baglietto pointed out that if there were no provision in the Industrial Tribunal (Appeals) Rules for some matter of procedure, that the appropriate rule governing an appeal from a decision of the Court of First Instance to the Supreme Court should be followed: see the Industrial Tribunal (Appeals) Rules, r.6. When it comes to appeals from the Court of First Instance it is the Clerk who prepares the record: see the Supreme Court Rules, r.19. And so far as the Supreme Court Rules are concerned, by r.5 this court may extend the time for the doing of any act before or after the time for doing so has lapsed.

Mr. Baglietto added that nobody had been misled or prejudiced because everybody knows what the appeal is all about, He submitted that the appellant should not pay the costs of and occasioned by its application because it was not at fault.

Mr. Nuñez complained, however, that the Tribunal had not been chivvied by telephone calls and letters into accelerating the preparation of the transcript. The discretion vested in the court was certainly there, but the extension of time was not to be a mere formality. Counsel for the appellant before Pizzarello, A.J. on January 11th, 1993 had not even known that the transcript had not been prepared and that the filing of the record was well out of time by then.

He also submitted that this court had no power to extend the time because r.5 of the Industrial Tribunal (Appeals) Rules said that the record

"shall" be filed within 24 days of the filing of the notice of appeal. Rule 6 of the same rules did not mention a power to extend the time and without such a power this court had no jurisdiction to do so. Turning to rr. 17 to 28 of the Supreme Court Rules, Mr. Nuñez pointed out that there was a power to extend time or to give directions for the lodging of the memorandum of appeal or any other direction at all, and the reason for that, he argued, was that industrial disputes had to be resolved quickly.

An appeal from the Industrial Tribunal to the Supreme Court was not a rehearing because it could only be based on points of law. The likelihood of an appeal being successful was not revealed. Two notices of appeal should have been filed, and again he submitted that this court has no power to sever the one into two separate notices. At the hearing before the Industrial Tribunal no order to consolidate the cases was made. Separate notices of complaint were filed at the outset and separate judgments were entered in the Court of First Instance. The notice of appeal was defective and Pizzarello, A.J. said so and the consequence was that the Supreme Court would probably dismiss the appellant's appeal, since what it would have before it would be void and of no account.

He then underlined the fact that the length of delay was inordinate. The complaints were made in September 1991 and here we are in February 1993 with the appellant not having paid the sum awarded to either respondent nor the costs which were awarded against it. No hearing date for the intended appeal had been set and it was likely that it would not be heard before the long vacation in the summer. Interest was mounting on the awards, which had not been paid. The appellant owned the casino in Gibraltar and that was mortgaged to the hilt. The shareholders and directors were not in Gibraltar and were not connected with Gibraltar. At any moment the appellant could go into liquidation because it was losing money at the casino. He submitted that if this application were granted then the appellant should pay the costs.

Mr. Baglietto, for the appellant, countered with the claim that it had substantial assets here in Gibraltar. The two respondents had charging orders over those assets. They had not moved to enforce their judgment. When the appellant applied for a stay of execution it was given a date five months ahead, so that delay was not its fault. There had been no inordinate delay. It was not possible to talk about inordinate delay when it was still a matter of months rather than years. He pointed out that appeals from the Industrial Tribunal to the Supreme Court are extremely rare and the procedure and rules unclear and untested. The rule about serving the record of appeal within a certain time had been overlooked. The court had an inherent jurisdiction to grant the extension of time.

If one notice of appeal was incorrect and a notice should be filed against each respondent this was not a gross error on the part of the appellant or an unforgivable one, and no formal objection had been raised

to it except in correspondence and verbally. The court could cure this. It would duplicate the work of the court to have two separate appeals.

There should, in my view, be two notices of appeal.

There was, continued Mr. Baglietto, a *bona fide* appeal. The judgment was severely flawed. The appellant could not get a date for the hearing of the appeal because the record was not ready and that was because in turn the transcript was not ready. The legislature had not intended the Supreme Court to be stricter with an appeal from an informal tribunal than with one from a proper court.

So much for the background and the submissions in this application. Now we have to play a form of clock golf around the rules to find out what the answer is to the application and to the submissions made for and against granting it. This is to be an appeal from the judgment from an Industrial Tribunal, so it is right to begin with the Industrial Tribunal (Appeals) Rules promulgated under s.88 of the Employment Ordinance on August 9th, 1974. Rule 2 states that—

> "any person (hereinafter referred to as the appellant) wishing to appeal to the Supreme Court against a decision of the Industrial Tribunal shall within 14 days of the date of the decision, file with the Registrar of the Supreme Court a notice of appeal in the form set out in the Schedule hereto."

The Schedule prescribes the notice which includes a portion where the appellant has to set out the points of law he wishes to argue. This is because r.3 says: "The notice of appeal shall state the point or points of law on which the decision of the Supreme Court is sought."

Next, the appellant, "within the like period of 14 days" has to "serve a copy of the notice of appeal on the other party or parties to the proceedings": see r.4. Then "within 24 days of the filing of the notice of appeal," the appellant has to—

> "file with the Registrar of the Supreme Court the record of appeal which shall contain a copy of the decision of the Industrial Tribunal under rule 14 of the Industrial Tribunal Rules, together with copies of any representations made or evidence given under rules 12 and 13 of those rules,"

unless the Registrar dispenses with copies of representations or evidence "if he considers that such copies are unnecessary for the purpose of deciding the point or points of law raised on the appeal": see r.5. Then, rather disappointingly, the Industrial Tribunal (Appeals) Rules in themselves do not provide for any power for this court to extend the time for taking any step before or after the time has elapsed. What they do state (in r.6) is that "in any matter not provided for by these rules the practice and procedure in an appeal from the Court of First Instance to the Supreme Court shall be followed as nearly as may be."

So we leave those Rules and go to the Court of First Instance Ordinance and discover that under r.45—

"subject to the provisions of this Ordinance, an appeal shall lie to the Supreme Court from a Court in the following cases—

(*a*) from all final judgments and decisions; and

(*b*) by leave of the judge or the Chief Justice from all interlocutory orders and decisions made in the course of any suit or matter before the court."

Then comes the provision in s.46 that "notwithstanding anything contained in any rules of court, the Supreme Court may entertain any appeal from the [Court of First Instance] on any terms which it thinks just." This confers a very wide discretion and jurisdiction on the Supreme Court for appeals from the Court of First Instance. The discretion will have to be exercised in a judicial manner.

Moving over now to the Supreme Court Rules, we find that under r.5(1) the Supreme Court "may by order extend or abridge the time limited by these rules for doing any act, whether before or after the expiration of such time and whether before or after the doing of the act." Under r.5(2), "an application by the clerk of the Court of First Instance or by the clerk of the magistrates' court for an order [extending or abridging time] under sub-rule (1) may be made informally and ex parte." Thus, others must do it formally and *inter partes*.

Moving to the end of the Supreme Court Rules, under the heading "*Other appeals*" we discover from r.35 that—

"where any enactment, other than the Court of First Instance Ordinance or the Magistrates' Court Ordinance, confers a right of appeal to the [Supreme Court] from any … tribunal … in any civil matter, the procedure prescribed by rules 17 to 28 or rules 29 to 34 inclusive shall be followed, whichever may be appropriate, with such modifications as may be necessary and except so far as may be otherwise provided by such enactment or any rules made thereunder or by these rules."

Appeals from the Court of First Instance in civil matters are dealt with by rr. 17 to 28 of the Supreme Court Rules and none of those deals with the power and jurisdiction of the Supreme Court to extend or abridge the time for taking any step in the approach to the hearing of the appeal. We must not forget, however, the general one so far as an appeal from the Court of First Instance to the Supreme Court is concerned, and the time for doing any act, which I have just read out, from r.5(1) of the Supreme Court Rules.

Rules 29 to 34 of the Supreme Court Rules deal with appeals by case stated from the magistrates' court and once again no such power to extend the time is set out, although the echo of r.5(1) of the Supreme Court Rules should still be ringing in our ears. Anyone intending to appeal from the decision of the Industrial Tribunal has to follow the rules in the Industrial Tribunal (Appeals) Rules, such as they are, keeping in mind the rules for the Court of First Instance and the Supreme Court

Rules. Applications to extend the time for doing any act or abridging it in the matter of an intended appeal from the Industrial Tribunal have to be made, according to my analysis of all those rules, to the Supreme Court, and may be made before or after the time has elapsed.

An applicant for the time to be extended after it has elapsed is seeking an indulgence and must not only explain the delay but reveal that the intended appeal has merits and a probability of success, for there can be no profit in giving someone more time to take a step if it is clear that the intended appeal is doomed to failure. This is trite law. The explanation for the delay and the grounds of the intended appeal should be set out in brief form in an affidavit that accompanies the application. Sometimes a draft memorandum of appeal exhibited to the affidavit will do.

The intending appellant was ordered to file an affidavit explaining the reasons for the delay but on that and its affidavit in support of the application, I cannot find any material on which this court can declare that the intended appeal has a possibility of success or some merit or that there are arguable grounds of appeal. The grounds are not in the notice of appeal which, according to the Industrial Tribunal (Appeals) Rules and the Schedule thereto, they should be. They are not apparent from a reading of the judgment.

The consequence is that this court will not exercise its jurisdiction and discretion in favour of the intended appellant but instead will dismiss this application with costs.

Application dismissed.