[1999–00 Gib LR 418]

ISOLA and NINE OTHERS v. CAMPELLO, ROCK NEWS LIMITED and GIBRALTAR ECHO LIMITED

COURT OF APPEAL (Schofield, C.J.): February 16th, 2000

Civil Procedure—appeals—extension of time—under Court of Appeal Rules, r.8(1), Court of Appeal may extend time to seek leave to appeal against interlocutory decision, after expiry of Supreme Court time-limit—notice of appeal not deemed withdrawn under r.53 if extension granted

The appellants brought proceedings in the Supreme Court against the respondents for defamation.

The appellants applied unsuccessfully for an order that parts of the respondents' amended defence be struck out. They served notice of appeal against the court's refusal of their application and filed a memorandum of appeal but failed to apply within 14 days of the court's decision for leave to appeal as required by s.22 of the Court of Appeal Ordinance and r.21(3) of the Court of Appeal Rules. They applied to the Court of Appeal for an extension of time in which to seek leave to appeal and for leave to be granted.

The respondents opposed the application.

The appellants submitted that r.8(1) expressly gave the Court of Appeal power, after the expiry of the time-limit for an application to the Supreme Court in r.21(3), to extend the time for an application for leave.

The respondents submitted in reply that (a) the Court of Appeal had no jurisdiction to hear the application, since under rr. 16 and 21 of the Court of Appeal Rules, an application for leave must first be made to the Supreme Court within the prescribed time; (b) r.8(1), giving the Court of Appeal power to extend the time for bringing an appeal, did not apply if no such application had been made to the lower court; (c) under r.53, the appellants' notice of appeal was deemed to have been withdrawn in any event, since the appeal had not been lodged as provided for in the Rules, namely, with the leave of the court; and (d) r.8(1) permitted an extension of time only for the procedural steps in an existing appeal, such as filing the memorandum of appeal, and not the filing of a notice of appeal when the original had been withdrawn.

Held, extending the time in which to apply for leave to appeal:

The Court of Appeal would exercise its discretion under r.8(1) of the Court of Appeal Rules to extend the time for an application to be made to the court for leave to appeal. Although an application for leave should

ordinarily be made to the Supreme Court either at the time of the interlocutory decision appealed from or within 14 days thereafter, under r.21, if that time-limit was missed, the appellant could apply to the Court of Appeal or one of its judges for an extension of time to do so. Rule 8(1) expressly included applications for leave within its remit. If the court extended time, the provisions of r.53 would be overridden, and the time for complying with any part of the appeal procedure could be extended. The application for leave would be heard by one of the Judges of Appeal who would hear the interlocutory appeal itself (para. 7; paras. 11–12).

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.22(vii): The relevant terms of this paragraph are set out at para. 3.

Court of Appeal Rules (1984 Edition), r.8(1), as amended by L.N. No. 3 of 1989 and L.N. No. 128 of 1991: The relevant terms of this sub-rule are set out at para. 5.

r.16: The relevant terms of this rule are set out at para. 4.

r.21(2): The relevant terms of this sub-rule are set out at para. 3.

(3): The relevant terms of this sub-rule are set out at para. 3.

r.52(1): "Subject to any extension of time, the appellant shall within sixty days after filing notice of appeal lodge the appeal by filing in the Registry of the court four copies of the record of appeal . . ."

r.53: The relevant terms of this rule are set out at para. 8.

N.M. Feetham and *N.W. Howard* for the appellants;
C.A. Gomez for the respondents.

1 **SCHOFIELD, C.J:** This application comes before me as a single Judge of Appeal. On September 15th, 1999, Pizzarello, A.J. made orders dismissing an application that certain paragraphs of the defendant's re-re-amended defence be struck out. The plaintiffs seek to appeal to the Court of Appeal against the orders but, this being an appeal against interlocutory orders, leave is required. Unfortunately for the plaintiffs, although they have served the required notice of appeal and, indeed, followed that with a memorandum of appeal, they neglected to apply for the required leave. The notice of motion before me seeks orders that (a) the time for making the application for leave to appeal be extended; and (b) such leave be granted.

2 It has been agreed between the parties that I should deal with the first part of the application only and that if I grant an extension of time in which to seek leave the application for such leave shall be dealt with at next week's session of the court. The reason for holding back the application for leave is that the merits of Pizzarello, A.J.'s decision will be gone into on that application, and that it is better that a judge who will hear the final appeal should deal with that aspect of the matter.

Furthermore, English counsel are involved in the matter and they would want to come to Gibraltar to deal with the facts and merits of Pizzarello, A.J.'s decision.

3 The application before me for an extension of time in which to seek leave to appeal would be a formal matter if it were simply a matter of discretion. The plaintiffs' lapse was a formal oversight which can be remedied in costs. However, the defendants argue that this is not a matter simply of discretion and that the court has no jurisdiction to extend time on this application. It is conceded by the plaintiffs that an appeal in this case does not lie "without the leave of the Supreme Court or of the Court of Appeal" (see s.22(vii) of the Court of Appeal Ordinance). Rule 21 of the Court of Appeal Rules deals with the procedure on application for leave in civil cases. Sub-rules (2) and (3) are the relevant provisions and they read:

> "(2) Leave to appeal to the court may be granted or refused by the Supreme Court without formal application at the time when the decision is given, and in such event the decree or order shall record that leave has been granted or refused accordingly.
>
> (3) In all other cases application to the Supreme Court for leave to appeal to the court shall be by motion or summons, which shall state the grounds of the application, and shall if necessary be supported by affidavit. Such application shall be made not more than fourteen days after the judgment or decision complained of and shall be intituled and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be included in the record of appeal. If leave is refused, the order refusing leave shall be produced on any application for leave to appeal made subsequently to the court."

4 It can be seen, therefore, that application for leave to appeal is made first to the Supreme Court at the time the decision is given, or within 14 days thereafter if application is not made immediately. Rule 16 provides: "Whenever application may be made to the Court of Appeal or to the Supreme Court it shall be made in the first instance to the Supreme Court." An application is therefore first made to the Supreme Court and it is only if such application is refused that an application is made to a judge of the Court of Appeal.

5 The power to extend time in proceedings before the Court of Appeal is given by r.8(1) which reads:

> "The court or a judge may extend the time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in conjunction with any appeal, notwithstanding that the time limited therefor may have

expired, and whether the time limited for such purpose was so limited by order of the court or by these rules or by order of the Supreme Court."

The "court or judge" referred to in this rule is the Court of Appeal or a Judge of Appeal, not the Supreme Court or a Supreme Court judge.

6 The argument of the defendants' counsel, Mr. Gomez, is that, by its own Rules, the Court of Appeal has no jurisdiction to hear an application for leave until the Supreme Court has refused leave, for the application must be made to the Supreme Court, either immediately on the delivery of the decision or within 14 days thereafter (r.21, as read with r.16). In this case, he argues, where no application for leave was made to the Supreme Court and the time-limit for making such an application has expired, r.8(1) has no application.

7 With respect to Mr. Gomez's arguments, I think the correct way to construe the Rules is this. An application for leave to appeal should first be made to the Supreme Court, either when the decision is delivered or within 14 days thereafter. If the intended appellant misses the time-limits prescribed by r.21(3) he is then entitled, by the express provisions of r.8(1), to apply to the Court of Appeal or one of its judges for an extension of time to make such application. I cannot think that the drafters of the Rules intended that a prospective appellant who misses his timing before the Supreme Court is thereby deprived of a right of appeal, particularly in the light of r.8(1) which expressly says that the court or judge may extend time for making an application "including an application for leave to appeal."

8 Mr. Gomez further argues that by r.53 the appeal is deemed to be withdrawn. Because leave to appeal was not applied for, r.53 locks in and every step which has been taken in the appeal is of no effect. Rule 53 reads: "If the appeal be not lodged as aforesaid the notice of appeal shall be deemed to have been withdrawn, and the appellant shall pay to the respondent the costs of the abortive appeal." It is argued that as leave was not granted as provided in the Rules, the appeal was not lodged and is therefore deemed to have been withdrawn.

9 Mr. Gomez's argument goes that if the notice of appeal is withdrawn it is not possible for the plaintiffs to seek an extension of time in which to file a new notice of appeal. The notice of appeal was deemed to be withdrawn 60 days after its filing (see r.52(1)) and no new notice was filed within 14 days from that date. The argument is that r.8(1) does not provide for an extension of time in which to file a notice of appeal.

10 Mr. Gomez submits that the court's power to extend time under r.8(1) relates to: (i) "any application," (ii) "bringing an appeal," and (iii) "taking any step in or in conjunction with any appeal." So far as (ii) is

concerned, he argues that "bringing an appeal" refers to filing the memorandum of appeal and not the notice. It is unnecessary for me to go into his reasons for that contention. So far as (i) and (iii) are concerned, Mr. Gomez argues that "any application" or "any step" refer to applications in an extant appeal and not one which is not yet in being because the notice of appeal has not been filed.

11 In my judgment, this places too fine or narrow an interpretation on r.8(1). It cannot have been the intention to provide for an extension of time in which to apply for leave to appeal, as the rule so specifically does, and then to deny a successful applicant the fruits of that application by restricting the extension of time to the leave and denying consequential extensions of time. A determination to extend time in which to apply for leave to appeal must be deemed to override r.53 and if leave is granted consequential extensions will flow.

12 I therefore grant the application for an extension of time in which to apply for leave to appeal until the matter is to be heard by a Judge of Appeal on Wednesday of next week. The question of costs will also be dealt with at that time.

Order accordingly.
