[1999–00 Gib LR 423]

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

COURT OF APPEAL (Neill, P., Clough and Waite, JJ.A.):
February 24th, 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leave to appeal against interlocutory decision, after expiry of Supreme Court time-limit—notice of appeal not deemed withdrawn under r.53 if extension granted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 respondents brought proceedings in the Supreme Court against the appellants for defamation.

The respondents applied unsuccessfully for an order that parts of the appellants' 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 in interlocutory appeals by s.22 of the Court of Appeal Ordinance and r.21(3) of the Court of Appeal Rules. The Court of Appeal (Schofield, C.J.) granted an extension of time in which to seek leave to appeal, under r.8(1) of the Court of Appeal Rules (in proceedings reported at 1999–00 Gib LR 418) and Pizzarello, A.J., sitting as a judge of the Supreme Court, subsequently granted leave.

On appeal, the appellants submitted that (a) both the extension of time and the grant of leave to appeal were invalid, since the respondents were deemed to have withdrawn their appeal under r.53 of the Court of Appeal Rules, having failed effectively to lodge the appeal; (b) r.53 was clearly intended to have this effect, since the equivalent rule in respect of criminal appeals was more lenient; (c) the power under r.8(1) to grant an extension of time for "bringing an appeal" or "taking any step in conjunction with an appeal" did not apply here, since the former phrase was restricted to lodging the memorandum of appeal, the latter contemplated steps subsequent to obtaining leave, and the sub-rule applied only to subsisting appeals; and (d) r.10 and Schedule 2, para. (*b*) of the Supreme Court Rules excluded the application of English rules to these proceedings.

The respondents submitted in reply that (a) r.8(1) expressly gave the court power to extend the time for seeking leave to appeal after the expiry of the relevant time-limit; (b) the time-limit in r.52(1) for lodging an appeal by filing the record of appeal was expressly subject to any extension of time, and since the lodging of the appeal and obtaining leave

to do so were part of the same process, the legislature could not have intended that the power to extend time should not apply to both; and (c) by r.46 and the English Rules of the Supreme Court, O.3, r.5(1), the court had the general power of the English Court of Appeal to extend time for compliance with rules of court.

Held, dismissing the appeal:

The single Judge of the Court of Appeal had properly extended the time for seeking leave to appeal even after the expiry of the time-limit, and consequently the order granting leave was validly made. The operation of r.53, which, if construed in isolation would effect the automatic withdrawal of an appeal when the time for lodging the appeal had expired, was precluded by the exercise of the court's discretion under r.8(1). When the Rules were construed as a whole, a clear legislative scheme was shown, conferring a discretion to extend time at all stages of the appeal process (para. 8; para. 10).

Case cited:

(1) *Lucas-Box* v. *News Group Newsp. Ltd*., [1986] 1 W.L.R. 147; [1986] 1 All E.R. 177.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.22:

". . . [A]n appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than—

(vii) without the leave of the Supreme Court or of the Court of Appeal, any interlocutory order or judgment made or given . . ."

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

r.37: The relevant terms of this rule are set out at para. 3.

r.46: The relevant terms of this rule are set out at para. 3.

r.48(1): The relevant terms of this sub-rule are set out at para. 3.

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

r.52(1): The relevant terms of this sub-rule are set out at para. 3.

r.53: The relevant terms of this rule are set out at para. 3.

r.56(1): The relevant terms of this sub-rule are set out at para. 3.

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

r.60(1): The relevant terms of this sub-rule are set out at para. 3.

r.61: The relevant terms of this rule are set out at para. 3.

r.66(3): The relevant terms of this sub-rule are set out at para. 3.

Supreme Court Rules (1984 Edition), r.10:

". . . [N]o English rule or practice or procedure shall apply or be followed in the court so far as it relates to any of the matters listed in Schedule 2."

Schedule 2: "Rules, practice and procedure relating to—

. . .

(*b*) appeals to or proceedings in the Court of Appeal . . ."

C.A. Gomez for the appellants;
T.G.B. Atkinson for the respondents.

1 **WAITE, J.A.:** On September 15th, 1999, Pizzarello, A.J. made an interlocutory order in these libel proceedings, striking out, on the application of the plaintiffs, certain particulars in a *Lucas-Box* defence (1). The judge refused to strike out the main paragraph or the remainder of the particulars. From that refusal the plaintiffs sought to appeal. Under s.22 of the Court of Appeal Ordinance, since this was an interlocutory case, no appeal could be made without leave. The plaintiffs, as a result of an unfortunate oversight by their advisers, were out of time in making their leave application, and they attempted to obtain an extension of time to enable them to mount it. At that point they were met by a jurisdictional objection raised by the defendants, who claimed that the Rules had the draconian effect of making their delay irremediable, so that the proposed appeal had become nugatory and was incapable of being revived.

2 An understanding of the issues raised by this objection requires reference to the governing rules which are as follows: the Court of Appeal Rules, made under s.8 of the Court of Appeal Ordinance, are divided into seven parts. Part I (containing rr. 1 to 17) is of general application; Part II (containing rr. 18 to 21) relates to proceedings in the Supreme Court; Parts III and IV (containing rr. 22 to 44) relate to first and second appeals in criminal matters; Parts V and VI (containing rr. 45 to 78) relate to first and second appeals in civil matters; and Part VII (containing rr. 79 to 81) relates to appeals to the Privy Council.

3 The Rules include the following provisions relevant to this case:

> "8.(1) 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 therefore 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."
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> "37. [applying to criminal appeals only] The court or a judge may in their discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of these rules, permit an appeal upon such terms and with such directions as they

may consider desirable in order that substantial justice may be done in the matter."

"46. In any case not provided for by these rules the practice and procedure for the time being of the Civil Division of the Court of Appeal in England shall be followed as nearly as may be."

"48.(1) Any person desiring to appeal to the court [of Appeal] in any civil cause or matter shall, within fourteen days of the decision complained of, give notice of appeal (in duplicate) to the Registrar of the Supreme Court, who shall forward one copy to the Registrar [of the Court of Appeal].

. . .

(5) Where any appeal lies only with leave, it shall not be necessary to obtain such leave to appeal before filing notice of appeal. If the Supreme Court shall have refused leave to appeal, any application to the court for leave to appeal shall be made not more than fourteen days after such refusal or after the filing of notice of appeal, whichever be the later."

"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 . . ."

"53. 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."

"56.(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court [of Appeal] to make."

(The same rule also contains requirements as to the lodging of copy documents and provides (by sub-rule (5)) that the memorandum and copy documents "together shall be called the record of appeal.")

"60.(1) An appellant may at any time after lodging the appeal and before the appeal is called on for hearing serve on the parties to the appeal and file a notice to the effect that he does not intend further to prosecute the appeal."

"61. Where an appeal is withdrawn under rule 60, or where notice of appeal has been given but the appeal has not been duly

lodged, any respondent who has given notice of cross-appeal may give notice of appeal and proceed therewith in the manner prescribed by the foregoing rules; and in any such case the times limited for giving notice of appeal, entering the appeal . . . and serving the record of appeal may, on application to the court . . . be extended so far as is reasonably necessary in all the circumstances of the case."

"66.(3) If the record of appeal is not filed within the prescribed time . . . and no sufficient ground is shown for the delay, the appeal may be dismissed."

4 Turning now to the sequence of relevant events in this case, it is as follows:

September 15th, 1999—Judgment given.

September 28th, 1999—Notice of appeal filed within time under r.48(1).

October 12th, 1999—Time expired for making application for leave to appeal under r.48(5).

November 26th, 1999 (sixty days after the filing of the notice of appeal and thus just within the period allowed by r.52(1))—Defendants purported to lodge a record of appeal. That was not, however, effective because they had omitted to seek leave to appeal.

February 10th, 2000—Defendants gave notice seeking an extension of time for making application for leave to appeal.

February 16th, 2000—Schofield, C.J., sitting as single Judge of the Court of Appeal granted the extension of time requested.

February 22nd, 2000—Pizzarello, A.J., sitting as a judge of the Supreme Court granted leave to appeal.

5 Mr. Gomez, on behalf of the defendants, now submits to this court that the purported extension of time for applying for leave to appeal granted on February 16th, as well as the leave to appeal granted on February 22nd, were ineffective because the appeal was no longer extant. He founds that submission upon the terms of r.53, which are, he submits, clear in their language and draconian in their effect. He contrasts the severity of r.53 with the more lenient discretion in criminal appeals to cure irregularities under r.37. That contrast must, he submits, have been deliberate. The fact that the draftsman was strict in the one instance and lenient in the other precludes any possibility of attributing an intention to be lenient in both instances.

6 The power to extend time under r.8(1), although it is (as he acknowledges) widely drawn, is not applicable, Mr. Gomez submits, for three reasons. First, the steps which it contemplates as the subject-matter of any order under it to extend time are steps undertaken in "conjunction" with an appeal. An application for leave to appeal is not, by definition, a step in "conjunction" with an appeal, but a separate, though essential, step preliminary to any appeal being permitted at all. Secondly, the rule is only apt to apply to cases where there is a living appeal or at least a living opportunity to appeal. Rule 8(1) cannot, he submits, apply to a case where the entire appeal process has been nullified as a result of the appeal having been deemed to be withdrawn altogether under r.53. The appeal has by then become abortive, and there is nothing further to be done than for the respondent to call for his costs and the parties to go their separate ways. Thirdly, he submits that the phrase in r.8(1) "bringing any appeal" must be restricted to the context of the lodging of the memorandum of appeal.

7 Mr. Atkinson, for the plaintiffs, points out that the court has undoubted power under r.52(1) to extend time for the lodging of the record of appeal. Yet the lodging of the record and the obtaining (in cases where that is necessary) of leave to appeal are both part and parcel of the process of lodging the appeal itself. What sensible purpose could there possibly be in allowing an opportunity for an extension of time in the one case and not in the other? He makes the same point in relation to r.66(3) which contains a clear discretion to save an appeal in cases where the record of appeal has not been filed within the prescribed time.

8 Mr. Atkinson's submissions are, in my view, to be preferred. It is true that when r.53 is viewed in isolation, Mr. Gomez is entitled to claim grammatical literacy to support his contention. When, however, the Rules are construed as a whole, from a standpoint that prefers harmony to anomaly, there emerges, to my mind, a clear scheme in favour of making a discretion available to the court to enlarge or extend time at every stage, and in relation to every step, of the appeal process, including the requirement to obtain leave to appeal in cases where that is necessary. Rule 8 is amply wide enough to confer a discretion to grant an extension of time for applying for leave to appeal, even in a case where the time for lodging the appeal has expired and the automatic withdrawal imported by r.53 would otherwise be applicable.

9 I am able to reach that conclusion independently of what Mr. Atkinson called his fall-back submission, namely, reliance on r.46 and invocation of the procedure under the English Rules of the Supreme Court, O.3, r.5(1). It is unnecessary, in those circumstances, to refer to a submission that was handed in by Mr. Gomez after the hearing, in which

he made reference to r.10 and paragraph (b) of Schedule 2 to the Supreme Court Rules in Gibraltar. It is not, in my view, of any assistance one way or the other.

10 I would dismiss the defendants' objection, and hold that the orders of Schofield, C.J. and Pizzarello, A.J. respectively, extending time for lodging an application for leave to appeal and granting leave to appeal, were validly made.

NEILL, P. and **CLOUGH, J.A.** concurred.

Appeal dismissed.
