[2019 Gib LR 48]

IN THE MATTER OF WARDOUR TRADING LIMITED

COHEN (as liquidator of WARDOUR TRADING LIMITED) v. NEKRICH and SAGREDOS

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): April 2nd, 2019

Civil Procedure—appeals—extension of time—on application under Court of Appeal Rules 2004, r.8 for extension of time to appeal, court (i) to identify and assess seriousness and significance of failure to comply with any rule, practice direction or court order; (ii) to consider why default occurred; and (iii) to evaluate all circumstances so as to deal justly with application, including (a) requirement that litigation conducted efficiently and proportionately, and (b) interests of justice—applicant granted extension of time to file cross-appeal as delay not serious or significant and no prejudice to respondent

The applicant applied for an extension of time to file a notice of cross-appeal.

The applicant was the liquidator in the compulsory winding up of a company, Wardour Trading Ltd. His predecessor as liquidator had sued the respondents for declarations that each was personally liable for all of the company's debts and accountable to the company for assets they had misapplied or retained. The Supreme Court (Jack, J.) gave judgment on February 9th, 2015 and made an order on March 18th, 2015 declaring that the respondents were jointly and severally liable to pay certain sums to the company and ordering them to pay those sums (the first respondent was represented at the trial but the second respondent was not). The first respondent appealed against Jack, J.'s order but as he failed to comply with an order for security for costs his appeal was dismissed. In July 2015, the second respondent applied to the Supreme Court to set aside Jack, J.'s order on the ground that he had not been properly served with the proceedings, alternatively that, because of his non-attendance at the trial, there should be a retrial. That application was dismissed in February 2016. The second respondent appealed against the dismissal and the applicant applied for security for his costs of the appeal. In November 2016, the second respondent was ordered to provide additional security for costs. He did not do so and the appeal was dismissed.

The second respondent had, in August 2015, issued a notice of appeal against Jack, J.'s order of March 2015 so far as it affected him. The notice

was filed some six months late and the second respondent therefore also issued a notice seeking an extension of time. That notice came on for hearing in September 2018. As a condition of extending time, the second respondent was ordered to pay outstanding costs owed to the applicant and to provide security for the applicant's costs of the appeal. The second respondent satisfied those conditions by December 11th, 2018 and became entitled to have his appeal heard. The second respondent filed his grounds of appeal on December 21st, 2018.

The time for filing the applicant's notice of cross-appeal expired on January 2nd, 2019. The notice was not in fact filed until February 15th, 2019. The applicant sought an extension of time.

Held, granting an extension of time:

On an application for an extension of time under r.8(1) of the Court of Appeal Rules, the three-stage test applied required the court (i) to identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order; (ii) to consider why the default occurred; and (iii) to evaluate all the circumstances of the case so as to enable the court to deal justly with the application, including (a) the requirement that litigation should be conducted efficiently and at proportionate cost; and (b) the interests of justice in the particular case. In the present case, in relation to stage one, the delay in filing the notice of cross-appeal was not serious or significant in the context of the progress of the appeal. In relation to the second stage, it had not been clear until the second week of December 2018 whether the second respondent would be able to pursue his proposed appeal. The applicant then took prompt steps to obtain advice from leading counsel and, given the vast amount of material as to which counsel had to refresh his memory before giving advice, the delay in filing the notice of appeal beyond January 2nd, 2019 was understandable and excusable. It caused no prejudice to the second respondent. The third stage required a consideration of all the circumstances of the case in deciding whether the applicant should be relieved from the consequence that the late filing of the notice was that he should not be allowed to rely on it at all. The second respondent alleged that the notice of cross-appeal appeared to be inviting the present court to make findings of fact that the judge did not make in the Supreme Court, and that it was not right to invite the Court of Appeal to engage in a fact-finding exercise which was for the tribunal. It might well be that this court, when considering the second respondent's appeal, would agree that it would not be in a position to embark on the exercises which the notice of cross-appeal invited it to perform. However, the court was not prepared at this stage to so rule. There would be no disadvantage to the second respondent in deferring the applicant's cross-appeal to the hearing of the substantive appeal, whereas there would be potential unfairness to the applicant if the court were to rule out at this stage his wish to advance the case made in the cross-appeal. The applicant would be granted an extension of time for filing his cross-appeal (paras. 9–18).

Case cited:

(1) *Denton* v. *T.H. White Ltd.*, [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] C.P. Rep. 40; [2014] 4 Costs L.R. 752, applied.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), Part 39.3(3):

> "(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside."

Court of Appeal Rules 2004, r.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 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."

N. Howard and *D. Martinez* for the applicant/respondent;
P. Caruana, *Q.C.* and *C. Allan* for the second respondent/appellant.

1 **RIMER, J.A.:** This is an application, by a notice of motion dated February 27th, 2019, for an extension of time for filing a notice of cross-appeal. It is made in proceedings which have a considerable history. I must summarize the story to date. In doing so, I have drawn on a judgment which I delivered in this court on October 25th, 2018, sitting with Sir Maurice Kay, P. and Dame Janet Smith, J.A. (reported at 2018 Gib LR 293).

2 The applicant is Samuel Cohen. He is the liquidator in the compulsory winding up of Wardour Trading Ltd. On August 10th, 2009, Mr. Cohen's predecessor as liquidator issued an originating summons against Michael Nekrich and George Sagredos for declarations that each was personally liable for all Wardour's debts and was accountable to Wardour for assets they had retained or misapplied. Following an 11-day trial in January 2015 before Jack, J., at which Mr. Nekrich was represented but Mr. Sagredos was not, Jack, J. delivered a 386-paragraph judgment on February 9th, 2015 which was followed by his order of March 18th, 2015 by which he (i) declared that the two respondents were jointly and severally liable to pay Wardour a sum in excess of US$48m. and were similarly liable to account to it for profits in a sum exceeding US$11m., and (ii) ordered them to pay such sums, with interest, to Wardour. The total amount they were ordered to pay was in excess of US$89m. Jack, J. also made costs orders against them which I need not detail.

3 Mr. Nekrich appealed against Jack, J.'s order but, following his failure to comply with an order for security for costs, his appeal was dismissed.

4 On July 10th, 2015, Mr. Sagredos applied to the Supreme Court to set aside Jack, J.'s order on the ground that he had not been properly served with the proceedings, alternatively on the ground that, because of his non-attendance at the trial, there should be a retrial: see CPR Part 39.3(3). Jack, J. heard this application in 2016 and, by his judgment of February 16th, 2016 (reported at 2016 Gib LR 46), held that the service of the proceedings on Mr. Sagredos had been regular and that, whilst the Part 39 application had been made promptly, there had been no good reason for Mr. Sagredos not to attend the trial and that he had no reasonable prospect of success on a retrial. Jack, J. dismissed the application.

5 Mr. Sagredos appealed against that dismissal and Mr. Cohen applied for security for his costs of the appeal. By a judgment and order of this court dated November 4th, 2016, Mr. Sagredos was ordered to provide additional security of £150,000 within 28 days. He did not do so and his failure in that regard resulted in his appeal being dismissed.

6 Mr. Sagredos had, in the meantime, also issued a notice of appeal against Jack, J.'s order of March 2015 so far as it affected him. The notice was filed on August 28th, 2015, it was therefore some six months late and on September 1st, 2015 Mr. Sagredos also issued a notice of motion seeking an extension of time for its filing under r.8(1) of the Court of Appeal Rules 2004. In para. 6 of my judgment of October 25th, 2018 (2018 Gib LR 293), I explained the circumstances in which that notice of motion came on for hearing on September 26th, 2018, over three years later. The outcome, for the reasons that I explained in that judgment, was that this court extended Mr. Sagredos's time for filing his notice until August 28th, 2015 and also made certain ancillary consequential orders which I need not detail. Importantly, though, as a condition of so extending time, this court ordered Mr. Sagredos to pay outstanding costs still owed to Mr. Cohen and to provide security for Mr. Cohen's costs of the appeal. Mr. Sagredos satisfied those conditions by December 11th, 2018 and so became entitled to have his appeal heard by this court. In deciding that Mr. Sagredos's time for appealing should be extended, this court applied the principles explained by the English Court of Appeal in *Denton* v. *T.H. White Ltd.* (1).

7 Mr. Sagredos filed his grounds of appeal on December 21st, 2018. The parties then agreed to extend his time for producing his list of documents to be included in the record of appeal and that list was served on January 16th, 2019. Mr. Cohen then had until January 30th to consider the list and to propose any additions to it. Following an agreed extension, Mr. Cohen complied with that obligation by February 13th.

8 The matter in issue on this application is the service by Mr. Cohen of a notice of cross-appeal. The time for filing any such notice expired on January 2nd, 2019. In the event, the notice of cross-appeal was not filed until February 15th, 2019. That was admittedly late and, by a notice of motion dated February 27th, 2019, Mr. Cohen sought an extension of time for its filing. There is no doubt that r.8(1) of the Court of Appeal Rules empowers this court to grant such an extension and there is also no dispute that the test that this court must apply in considering whether or not to grant the extension is the three-stage test explained in *Denton* (1). The issue for us is whether or not, applying that test, the court should exercise its jurisdiction to extend time. The basis on which it is said by Mr. Cohen to be just to do so is explained in an affidavit of Darren Martinez, a barrister in Hassans, Mr. Cohen's lawyers.

9 In my judgment of October 25th, 2018, I referred as follows to Lord Dyson, M.R.'s summary of the *Denton* test (2018 Gib LR 293, at para. 22):

> "22 In *Denton* . . . Lord Dyson, M.R. summarized thus the essence of the three-stage test ([2014] 1 W.L.R. 3926, at para. 24):
>
> '. . . A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".'
>
> Factors (a) and (b) are explained in *Denton* (*ibid.*, at para. 33) and are '(a) the requirement that litigation should be conducted efficiently and at proportionate cost; and (b) the interests of justice in the particular case.'"

10 I turn to consider the application of that three-stage test to this application. As regards stage one, Sir Peter Caruana, Q.C., for Mr. Sagredos, concedes that the delay in filing the notice of cross-appeal is not serious or significant in the sense that those words bear in the present context and that no point arising under stage one can be deployed in Mr. Sagredos's favour. My understanding is that, were Mr. Sagredos to comply with the conditions of the October 2018 order, as he did, the parties had intended, or at least contemplated, that the appeal would be listed for hearing during this court's current session. In the event, however, and before the notice of cross-appeal had been served, Mr. Sagredos had already proposed that the hearing of the appeal might be deferred until this

court's autumn 2019 session, to which Hassans later responded with their agreement. In the meantime, the notice of cross-appeal was filed, and it is asserted by Sir Peter in his skeleton argument, although he does not support this with evidence, nor did this form part of his oral argument, that this had a material influence on his firm's agreement to defer the hearing of the appeal to the autumn session. Sir Peter concedes, however, that Mr. Sagredos was not averse to the deferring of the listing of the appeal and disclaims any suggestion that this has caused Mr. Sagredos any prejudice. Even if, as to which I am far from satisfied, the late filing of the notice had any material impact upon the deferring of the listing of the appeal, it is plain that neither side is making any complaint about that and, in the circumstances, I would not regard the delay in the filing of the notice as having been relevantly serious or significant. In so concluding, I have had regard to the fact that Mr. Sagredos's stroll to the court in the prosecution of this appeal following the final dismissal in November 2016 of his bid to have a retrial of the claim against him has been as leisurely as they come. His unsupported suggestion that the lateness of the notice of cross-appeal had a material influence on deferring the hearing of the appeal until the autumn 2019 session is one by which I am not convinced. I have no doubt that, had the appeal proceeded during the current session of this court, Mr. Sagredos could have dealt perfectly adequately with the issues raised by the notice of cross-appeal.

11 The second stage of the *Denton* test requires a consideration of the reasons for the lateness of the filing of the notice of cross-appeal. They are explained in Mr. Martinez's affidavit. Put shortly, once it was clear to Mr. Cohen (by mid-December 2018) that Mr. Sagredos would be pursuing his appeal—he had by then paid the costs and provided the security in satisfaction of the conditions of the extension order—Mr. Cohen determined to retain the services of Mr. Mowschenson, Q.C., the leading English counsel who had represented him at the trial nearly four years earlier. Hassans made prompt contact with Mr. Mowschenson, who responded that he would be available to conduct the appeal on behalf of Mr. Cohen but would be away from his chambers until January 21st, 2019. He also said that he would need to consider all the original trial papers and transcripts and, in January 2019, Hassans couriered to him some 20 lever arch files of such documents. The first matter Mr. Mowschenson was instructed to advise upon was as to whether Mr. Sagredos's list of documents for the Record of Appeal needed to be supplemented. The time limit for that was January 30th, 2019, and Sir Peter's firm agreed to extend the time for that to February 13th, 2019.

12 At some point, Mr. Mowschenson also advised that a notice of cross-appeal should be filed and he drafted one. On February 8th, 2019, Hassans advised Sir Peter's firm that they would be filing such a notice at the first opportunity and would seek an extension of time for doing so.

The notice was later filed on February 15th, 2019 and the extension application was dated February 27th, 2019.

13 Sir Peter's submission to us was that the circumstances just explained provided no good reason for Mr. Cohen's failure to file the notice by the due date of January 2nd, 2019. He said that Mr. Cohen had known of Mr. Sagredos's criticisms of Jack, J.'s judgment ever since the filing by Mr. Sagredos of his affidavit of November 16th, 2016 in his July 2015 "set aside" application. He said that Mr. Cohen had also had a draft outline of Mr. Sagredos's proposed grounds of appeal since September 26th, 2018. He said also that Mr. Cohen knew by December 11th, 2018, when Mr. Sagredos paid the final balance of the money he had to pay or provide under the conditions of the order of October 2018, that Mr. Sagredos would be proceeding with his appeal. He also invoked the point, to which I have already referred in dealing with stage one of the *Denton* test, that but for the late filing of the notice of cross-appeal the appeal would or could have been heard during this session, although again he disclaims that the consequence has been to cause Mr. Sagredos any prejudice.

14 I have said why, as is conceded, the delay in filing the notice should not be regarded as serious or significant in the context of the progress of this appeal, and Sir Peter's separate blandishments in relation to the reasons for the delay in filing the notice of cross-appeal carry no weight with me either. In part his argument appears to be to the effect that Mr. Cohen has been in possession since November 2016, or at any rate September 2018, of information that would enable him to consider whether he would or might wish to file a notice of cross-appeal and that therefore his failure to serve such a notice by January 2nd, 2019 is inexcusable. I regard that argument as without merit. Whether Mr. Sagredos was in fact going to, or to be able to, pursue his proposed appeal was not clear until the second week of December 2018. Until then there was no reason why Mr. Cohen should have incurred so much as a penny of costs in considering, or obtaining advice as to, whether he might need to file a cross-appeal. Any costs so incurred would, if Mr. Sagredos had not complied with the conditions of the order of October 25th, 2018, have been wholly wasted. When, however, Mr. Cohen did know that Mr. Sagredos was able, and intended, to proceed with his appeal, he took prompt steps to obtain advice from leading counsel on the matter of the appeal; and, given the vast volume of material about which counsel had to refresh his memory before he could give any advice on that, the delay in the filing of the notice beyond January 2nd, 2019 appears to me to have been understandable and excusable. It caused no prejudice to Mr. Sagredos; nor, I consider, would it have done so even if the appeal had gone ahead during this court's current session. In my judgment, the reasons for the delay in filing the notice do not point towards a decision on this application adverse to Mr. Cohen.

15 I come finally to the third stage of the *Denton* test, which requires a consideration of all the circumstances of the case in deciding whether or not Mr. Cohen should be relieved from the consequence that the late filing of the notice is that he should not be allowed to rely on it at all. Here Sir Peter is on stronger ground. His criticism of the notice of cross-appeal is that it does not seek to advance grounds on which Jack, J. could and should have arrived at the conclusion that he did, being grounds that were *other than* or *additional to* those relied upon by Jack, J. He says that what the notice seeks to do is to rely on the *same* grounds upon which Jack, J. found against Mr. Sagredos, but to seek to uphold them on factual bases different from those upon which Jack, J. in fact made his decision.

16 This is, I consider, a fair summary of the substance of the notice of cross-appeal, although I would not regard such substance as rendering the notice illegitimate as a notice of cross-appeal. Sir Peter's real point, however, which I agree is one of potential substance, is that what the notice appears to be inviting this court to do on the hearing of the appeal is to make findings of fact that Jack, J. did not make; and he submits, with obvious force, that it is ordinarily no part of the function of the Court of Appeal to make findings of fact that the trial judge has not made. The submission comes down to the proposition that it cannot be, and is not, right to permit Mr. Cohen to rely on a cross-appeal that invites the Court of Appeal to engage in a fact-finding exercise for which it is not equipped and which is of a nature that, if it ought to have been carried out at all, was one for the fact-finding tribunal, namely the trial judge.

17 These are powerful points and it may well be that this court, when considering Mr. Sagredos's appeal, will agree with Sir Peter that it will not be in a position to embark upon the exercises that the three paragraphs of the notice of cross-appeal invite the court to perform. If this court should take that view, it will say so and will decline to subscribe to the invitations contained in those paragraphs. For my part, however, I would not be prepared to rule at this stage that such invitations are ones that there will be no question of this court entertaining. The reason for that is that this court has at this stage only the most superficial understanding of the apparently complicated factual background that was before the trial judge and of which this court will have to be properly educated for the purposes of deciding the substantive appeal. When the court has been so educated, it will be in a far better, and therefore safer, position than we are today to judge the legitimacy or otherwise of the assertions advanced in the notice of cross-appeal. If and to the extent that Sir Peter's criticisms of the notice are well founded, his points can equally be made on the hearing of the appeal, when the court will be able to give them a rather better informed consideration that it can at this stage. There will, in my judgment, be no disadvantage to Mr. Sagredos in deferring to the hearing of the substantive appeal Mr. Cohen's bid to rely on the cross-appeal, whereas there will be a

potential unfairness to Mr. Cohen if this court, with nothing like the full picture before it, were to rule out at this stage his wish to advance the case made in the cross-appeal. If anything in the cross-appeal justifiably enables Mr. Cohen to succeed in upholding his judgment, it would be unjust to deprive him of that opportunity at this stage. If, however, it should turn out, for the reasons advanced by Sir Peter, that there is no merit in anything in the cross-appeal, Mr. Sagredos can be compensated in costs for his efforts incurred in responding to it.

18 In the circumstances, I consider that this is a case in which Mr. Cohen's time for filing the cross-appeal should be extended to February 15th, 2019. I would so order.

19 **ELIAS, J.A.:** I agree.

20 **KAY, P.:** I also agree.

Extension of time granted.