[2021 Gib LR 494]

SLACK and COX v. SAILS MANAGEMENT LIMITED

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 5th, 2021

2021/GCA/08

Civil Procedure—appeals—grounds of appeal—under Court of Appeal Rules, r.53(1), grounds of appeal to be lodged within 21 days of filing notice of appeal—appeal deemed withdrawn under r.54 where no sufficient grounds shown for failure to comply with time limit

The respondent sought an order against the appellants requiring them to restore their apartment to its original layout.

The respondent was the management company of a residential block of apartments where the appellants lived. A dispute arose concerning works carried out by the appellants to their apartment balcony, which it was alleged were in breach of covenant. The respondent brought an action seeking, amongst other things, an order requiring the restoration of the balcony to its original condition.

In a judgment dated December 2nd, 2020, the Supreme Court (Restano, J.) found in favour of the respondent. On December 8th, 2020, the appellants filed a notice of appeal. A notice of address for service was sent by the respondent on December 23rd, 2020. Grounds of appeal were lodged by the appellants on March 9th, 2021, by which time the respondent had issued a notice of motion seeking an order that the appeal be deemed to be withdrawn or struck out on the grounds that (i) the appellants had failed to serve a notice of appeal as required under rr. 6(1) and 48(1) of the Court of Appeal Rules; and/or (ii) the appellants had failed to lodge the appeal as required by r.53. The Chief Justice rejected ground (i) but acceded to ground (ii). He ruled that the notice of appeal was deemed to have been withdrawn and that the appellants were to pay the costs of the aborted appeal.

Rule 53(1) provided:

> "53.(1) Subject to any extension of time, the appellant shall within twenty-one days after filing notice of appeal, or within twenty-one days after being notified by the Registrar that a copy of any judgment or transcript for which an application has been made under rule 49(1) or (2) is ready for collection, whichever is the later, lodge the appeal by filing in the Registry of the Court six copies of the grounds of appeal, and either lodging in court the sum of £120 as security for the

costs of appeal or entering into a bond for that amount to the satisfaction of the Registrar."

The appellants submitted *inter alia* that a transcript of the hearing of December 2nd, 2020 had been requested on December 18th, 2020 and, as the transcript was only notified by the Registrar as being available on February 25th, 2021, the notice of appeal was thereafter lodged in time for the purposes of r.53(1).

Held, dismissing the appeal:

The appeal was not lodged within the time stipulated by r.53(1). The decision of Restano, J. had been made and the judgment handed down on December 2nd, 2020. As the notice of appeal was filed on December 8th, 2020, the lodging of the grounds of appeal on March 9th, 2021 was well out of time. The appellants' argument that their notice of appeal was not out of time because they had requested a transcript of the December 2nd, 2020 hearing but had not been notified by the Registrar as to the availability of the transcript until February 25th, 2021 was untenable. The application for the transcript had not accompanied the notice of appeal as required by r.49(2) nor had a deposit or undertaking been given as required by the Registrar on December 18th, 2020 for the costs of provision of a transcript of the hearing. Although the appellants had concerns as to whether the December 2nd, 2020 judgment was properly handed down, they had been able to file notice of appeal on December 8th, 2020 and thereafter it had been perfectly possible for them to file grounds of appeal in the usual way within the specified time limit, which they did not do. The appellants were therefore correctly adjudged not to have lodged the appeal in compliance with r.53(1). The court's discretion to order that the appeal be deemed to have been withdrawn under r.54 was predicated on the court being satisfied that no sufficient ground was shown for such default. The court agreed with the Chief Justice that no sufficient ground had been shown. On the facts of this case there had been significant and sustained non-compliance with the rules and the asserted but misplaced need to obtain a transcript could not operate to subvert that conclusion (paras. 14–22).

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, referred to.

Legislation construed:

Court of Appeal Rules 2004, r.6(1): The relevant terms of this subrule are set out at para. 5.
r.48: The relevant terms of this rule are set out at para. 5.
r.49: The relevant terms of this rule are set out at para. 5.
r.53(1): The relevant terms of this subrule are set out at para. 5.
r.54: The relevant terms of this rule are set out at para. 5.

C. Finch (instructed by Verralls) for the appellants;
N. Gomez (instructed by Charles Gomez & Co.) for the respondent.

1 **DAVIS, J.A.:**

Background

The appellants were the defendants in an action brought by the respondent, Sails Management Ltd., the management company of a block of apartments in Queensway Quay Marina. There are 42 apartments in the block. The appellants own one of such apartments under the terms of a sublease dated June 25th, 2010. In a nutshell, for present purposes, the essential dispute related to certain works concerning a balcony carried out by the appellants at their apartment. It was alleged that such works were carried out in breach of covenant. Amongst other things an order requiring the restoration of the balcony to its original condition was sought.

2 By a detailed written judgment, previously circulated in draft to the parties during November 2020, and the judgment itself being dated on its face December 2nd, 2020 on the last page (reported at 2020 Gib LR 410), Restano, J. found in favour of the respondent management company.

3 There is a dispute as to whether or when that judgment was actually handed down. At all events the appellants filed a notice of appeal dated December 7th, 2020 on December 8th, 2020. A notice of address for service was sent on December 23rd, 2020 by the respondent. Grounds of appeal were thereafter lodged on behalf of the appellants on March 9th, 2021. Before such grounds of appeal were lodged, the respondent had issued a notice of motion on February 24th, 2021 seeking an order that the appeal be deemed to be withdrawn or struck out on the grounds that—

(i) the appellants had failed to serve a notice of appeal as required under r.6(1) and r.48(1) of the Court of Appeal Rules; and/or

(ii) the appellants had failed to lodge the appeal as required by r.53.

4 By reserved written decision dated May 6th, 2021, Dudley, C.J. rejected the first ground advanced by the respondent. But he acceded to the second ground. He ruled that the notice of appeal was deemed to have been withdrawn and that the appellants were to pay the costs of the aborted appeal. The appellants were aggrieved by that decision and have applied to this court under s.24 of the Court of Appeal Act 1969.

Rules

5 In order to make sense of this application it is I think convenient to set out the relevant rules at the outset.

Court of Appeal Rules, r.6(1):

"6.(1) All summonses, warrants, orders, rules, notices and mandatory processes whatsoever of the court may be signed by any judge or by the Registrar and shall be sealed with the seal of the court. Every order

of the court shall be dated as of the date on which the judgment was given or order made and shall in addition show the date on which the order was extracted."

Rule 48(1), (2), (4) and (6):

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

(2) A notice of appeal shall be substantially as in Form D in Schedule 1 and shall be intituled in the proceedings from which it is intended to appeal.

. . .

(4) Notice of appeal shall be served by the appellant within the like period of fourteen days on all parties directly affected by the appeal or their solicitors respectively. It shall not be necessary to serve parties not so affected. The names and addresses of all persons intended to be served shall be stated in the notice of appeal.

. . .

(6) For the purposes of this rule, where a judge has given judgment but reserved his reasons, 'decision' means the judgment and the reasons, and the date when the reason were delivered shall be deemed to be the date of decision."

Rule 49(1), (2) and (3):

"49.(1) If the judgment of the Supreme Court was not handed down in writing, the notice of appeal shall be accompanied by an application in writing for a copy of the judgment, which the Registrar shall supply as soon as practicable.

(2) If it will be necessary, in order for the Court to decide one or more of the issues raised in the appeal, to refer to evidence given orally or to some other part of the hearing in the Court below, the notice of appeal shall be accompanied by an application in writing for a copy of the transcript of the relevant part of the evidence or proceedings.

Provided that where any recording made is found to be defective, either in whole or in part, an application for a transcript under paragraph (a) of this sub-rule shall be deemed to be of to include (as the case may require) an application for a typewritten copy of the judge's notes of the hearing or of the appropriate part or parts of those notes.

(3) Subject to rule 12, an application under sub-rules (1) or (2) shall be accompanied by such deposit as the Registrar may require towards the prescribed fee, and the balance of the fee shall be paid when the transcript or copy is supplied."

Rule 53(1):

"53.(1) Subject to any extension of time, the appellant shall within twenty-one days after filing notice of appeal, or within twenty-one days after being notified by the Registrar that a copy of any judgment or transcript for which an application has been made under rule 49(1) or (2) is ready for collection, whichever is the later, lodge the appeal by filing in the Registry of the Court six copies of the grounds of appeal, and either lodging in court the sum of £120 as security for the costs of appeal or entering into a bond for that amount to the satisfaction of the Registrar."

Rule 54:

"54. If the appeal is not lodged as aforesaid, and no sufficient ground be shown for such default, the Court may, on the application of the Respondent, order that 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."

Disposal

6 Turning to the proper disposal of this application, it is plain from the express wording of r.48(1) that the time for appealing is within 14 days from the decision complained of. The period of time permitted is not geared to the time when the relevant order is drawn up and sealed. So what then was the date of the decision in this case? Mr. Finch for the appellants has contended that the judgment of Restano, J. was not handed down on December 2nd, 2020. Indeed, it would appear from aspects of his submissions that he may not accept that the judgment has ever been handed down, not even as at this date today. At all events, he says that it was reasonable for him to seek clarification on the position by seeking a transcript of the hearing of December 2nd, 2020. I have to say that this is, in my view, a somewhat baffling stance to have taken.

7 The notice of appeal in this case, as filed on December 8th, 2020, in terms refers to "the decision of the Honourable Mr. Justice Restano given herein at the Supreme Court of Gibraltar on 2 December 2020." That of itself seems flat against the position now being advanced on behalf of the appellants. In any event this court has, as had the Chief Justice, seen the transcript of the hearing of December 2nd, 2020. Amongst other things, it is clear that the judge had referred to picking up a few grammatical errors and typographical errors in the judgment, which he had previously circulated

to the parties. He went on to say, as the transcript shows: "as I said there are few other very minor grammatical and typographical errors which I will correct, and what I propose to do is to provide you with the final copy of the version of the judgment later on today." The judge then referred to setting a consequential hearing, for argument in relation to costs and so on, on Thursday, December 17th. The transcript, which admittedly is perhaps to a degree somewhat garbled, then goes on later to record the judge as stating: "So I won't unless you require it to be necessary dispense for the need to read the judgment now I'll [unintelligible] it down and will reconvene on the 17 . . ."

8 It seems to me clear enough from that transcript, even if it is to a degree somewhat garbled in transcription, that Restano, J. was indeed handing down his judgment on that date and was further stating that he did not see the need to read it out. That some minor typographical revisions thereafter were contemplated was immaterial. Yet further, that is wholly confirmed by the directions order subsequently made on December 17th, 2020 following a hearing on that date attended by Mr. Finch as counsel for the appellants and by Mr. Gomez on behalf of the respondent. By his directions order made on that date, Restano, J. amongst other things, set the terms of the final injunction ordered, gave directions as to a stay of execution pending appeal, and made an order for costs. That whole order was predicated on there having been a decision previously made and judgment handed down, and at no stage during that hearing did Mr. Finch ever query that that was the case. Indeed it is impossible to see how the various orders and directions on December 17th, 2020 could have been given unless it was mutually contemplated and accepted that a decision had indeed been made and judgment handed down.

9 The respondent had sought to argue that the notice of appeal dated December 7th, 2020 and filed on December 8th, 2020 was invalid, amongst other things in that no original notice of appeal bearing the signature and seal of the Registrar had been served on the respondents. All that had been served at that time was an unsigned and unsealed copy of the notice of appeal bearing date December 7th, 2020 and then filed on December 8th 2020.

10 As to that particular contention, Dudley, C.J. had ruled that on a combined reading of r.6 and r.48(1) "service of a signed and sealed original Notice of Appeal was required and no such Notice of Appeal in this case had been so served." But having so ruled he then went on to say this at para. 10 of his decision:

> "An appellant by issuing a Notice of Appeal and a Respondent in filing the Notice of Address for Service submit to the jurisdiction of the court. In my judgment the Respondent, having filed the Notice of Address for Service without objecting to the jurisdiction of the court

at that point in time, waived the defect in the process by which it was brought into the proceedings."

Accordingly that part of the respondent's application failed. That paragraph of the Chief Justice's decision seems to me, if I may say so, plainly to be correct. Indeed Mr. Gomez appearing on behalf of the respondent before us today has not sought to challenge that. Consequently, that particular issue is not live before us.

11 However, both advocates before us asked this court to comment on the Chief Justice's prior ruling that service of a signed and sealed original notice of appeal was required under the rules. Since that would necessarily be *obiter* commentary on the part of this court, I would for my part be very reluctant to express any final view on that point. In truth the matter, as I see it on a preliminary basis, is potentially quite tricky. Rule 6, for example, indeed contemplates that notices are to be signed by the Registrar and sealed. But self-evidently that cannot be so for the purposes of giving notices of appeal to the Registrar under r.48(1), because that sub-rule presupposes that the notice of appeal is to be given to the Registrar himself at that particular stage. It might then be said that it is difficult to see why any difference should have been intended for service of a notice of appeal under r.48(4) "within the like period of fourteen days." Moreover, if that were so required, then as Mr. Finch pointed out in argument, that might in practice eat into the 14-day period otherwise given to an appellant to consider whether to file and serve a notice of appeal.

12 On the other hand, it could be pointed out that there are requirements for the form of a notice of appeal (see r.48(2) and the form specified in schedule D to that order), and it can be said that a respondent is entitled to know that a notice of appeal has indeed been properly issued in the court before it is served.

13 It may be that in practice this point should normally not be material. No doubt it would be convenient practice for an appellant to serve a signed and sealed notice of appeal in the prescribed form if that is available within the 14-day period. If, however, such a signed and sealed notice is not available within that period, because for example the Registrar has not yet had the opportunity to affix the court seal to the document, it is difficult to conceive that an extension of time would in any event be refused if a respondent were bold enough to take the point. But that said, there does seem to me to be some lack of clarity in the operation of the rules in this particular respect, and it may be that those having responsibility for the drafting of the rules might care to consider the point. However, as I say, it is not necessary or I think appropriate for me to seek to express any more considered observations on that and when we have not heard full argument on the point.

14 The real issue for this court, therefore, is whether this appeal was lodged within the time stipulated by r.53(1). As will be gathered, I am in agreement with the Chief Justice that the decision had been made and the judgment handed down on December 2nd, 2020. And since the notice of appeal itself had been filed on December 8th, 2020, on the face of it the lodging of the grounds of appeal on March 9th, 2021 was well out of time.

15 Mr. Finch, however, advanced an ingenious argument disputing that. It seems that on December 18th, 2020, Verralls, the firm instructing Mr. Finch, had written to the Registrar seeking a transcript of the hearing of December 2nd, 2020. On that day, that is to say December 18th, 2020, the Registrar emailed Mr. Finch seeking an undertaking as to the costs of obtaining such transcript, an undertaking which was not in fact given until February 23rd, 2021. Moreover, no payment of £120 by way of security for costs for the purposes of r.53(1) was ever made. It may be in fact observed that the grounds of appeal lodged on March 9th, 2021 were only lodged after Charles Gomez & Co., who instruct Mr. Gomez, had issued its notice of motion on February 24th, 2021 seeking an order that the appeal be deemed to have been withdrawn or should be struck out. Mr. Finch's argument nevertheless was to the effect that since a transcript of the hearing of December 2nd, 2020 had been requested on December 18th, 2020, and since such transcript was only notified by the Registrar as being available on February 25th, 2021, the notice to appeal was thereafter lodged in time for the purposes of r.53(1).

16 In agreement with the Chief Justice, I regard that as an untenable argument. For one thing, the application for the transcript had not "accompanied" the notice of appeal as required by r.49(2). For another, no deposit or undertaking by way of deposit as required by the Registrar on December 18th, 2020 was ever given. It seems to me reasonable practice that an undertaking as a form of deposit could be so required by the Registrar and parties can either comply with that request or alternatively offer alternative payment. But in any event it is impossible to see how such a transcript of the hearing of December 2nd, 2020 could bear on the issues raised in the substantive appeal, as indeed a perusal of the grounds of appeal subsequently lodged demonstrate. It is impossible to see how such a transcript was "necessary" for the decision thereon; and it seems to me that it is to those substantive issues which r.49(2) is directed. I do not accept Mr. Finch's contention that it was "necessary" for the purposes of deciding one or more issues in the appeal to determine when the judgment was handed down, in terms of the ambit of that rule. In any event, it is in truth obvious, to my way of thinking, that the judgment had indeed been handed down and the decision made on December 2nd, 2020 when Mr. Finch himself was present and again as was confirmed at the hearing on December 17th, 2020, when Mr. Finch himself was again present.

17 Mr. Finch has said that he had concerns as to whether or not the judgment had indeed been properly handed down. But as I have said, he was in a position to file notice of appeal and did so on December 8th, 2020, and thereafter he was in a position to file grounds of appeal without reference to any transcripts at all. Mr. Finch says that the confusion was not of his own making. With all respect, he seems to have seen confusion where in truth none existed. Certainly, the respondent had never sought to raise any doubt on this aspect. It was perfectly possible for the appellants, having filed notice of appeal on December 8th, 2020, thereafter to lodge their grounds of appeal in the usual way within the specified time limit, and that they did not do.

18 Accordingly, as I see it, the appellants were correctly adjudged not to have lodged the appeal in compliance with r.53(1). Of course, under the terms of the rule the court's discretion to order that the appeal be deemed to have been withdrawn under r.54 is predicated on the court first being satisfied that no sufficient ground was shown for such default. Here, on abundant materials, the Chief Justice was plainly satisfied that no sufficient ground had been shown for such default, a view I myself share. In truth, on the facts of this case there was significant and sustained non-compliance with the rules and the asserted but misplaced need to obtain a transcript simply cannot operate to subvert that conclusion.

19 Moreover, in modern times, having in mind the principles and approach adopted in cases such as *Denton* v. *White* (1), a party should not be surprised when the courts take a firm view in cases of material non-compliance with the rules, where, as in the present case, no satisfactory explanation is given. Rules of court are not to be regarded as tiresome optional extras for litigants. They are designed to promote a clear and consistent procedural code applicable to all litigants and for the better enhancement of the good administration of justice.

20 Mr. Finch sought to say that substantive justice should prevail over procedural justice and it would be unfair on his clients if they were simply to be deprived of an appeal which he says is an appeal based on substantial grounds. But such arguments cannot be advanced as a complete answer to the need to comply with the procedural requirements of the rules. Mr. Finch also sought valiantly to say that if he himself had misapprehended the position and had adopted a wrong stance in seeking to press for a transcript of the judgment hearing of December 2nd, 2020 and thereafter in failing to lodge the appeal within the requisite time, then that too should not be visited on his clients. But again, as it seems to me, rules must be given effect.

21 For completeness, I should add that no further or other valid application for relief from sanctions or for an extension of time has been filed on behalf of the appellants. In any event, in so far as Mr. Finch orally sought to ask

this court to grant an extension of time, it would add nothing and I think it would be wrong for this court to begin to entertain such an application.

Conclusion

22 Accordingly, I would for my part dismiss the appeal. I would uphold the decision that the notice of appeal should be deemed to have been withdrawn.

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

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

Appeal dismissed.
