JAMAICA

IN THE COURT OF APPEAL

Supreme Court Civil Appeal No. 28/69.

~~SUIT No. E. 78 of 1960.~~

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

B E T W E E N PETHRO BROWN - PLAINTIFF/APPELLANT (APPLICANT)

A N D AMBROZINE NEIL) and ERNEST NEIL) DEFENDANTS/ RESPONDENTS

E.C.L. Parkinson Q.C. for Applicant.

Leacroft Robinson Q.C. and Norman Hill Q.C. for Respondents.

Heard: December 13, 14, 1971
January 21, 1972

FOX, J.A.

These are our reasons for dismissing this notice of motion in which the plaintiff applied for an extension of time within which to file notice and grounds of appeal and the record. The affidavit of the solicitor for the applicant in support of the motion contained the following averments:

"2. That Notice and Grounds Of Appeal herein were filed in the Registry Of The Court Of Appeal on the 26th day of August, 1969, and served on the same day.

3. That the Record was Settled by The Deputy Registrar Of The Court Of Appeal on the 19th day of October, 1969, and was filed on the 9th day of December, 1969, after the Order of this Honourable Court made on the 21st day of October, 1969, following an Application For Extension Of Time within which to file the Record.

4. That on the 6th day of January, 1970, I received a letter from Mr. E.C.L. Parkinson, Q.C., dealing with the time within which Notice and Grounds Of Appeal should have been filed, and served, copy of which letter is exhibited to this Affidavit and marked "A" for identity.

5. That from Counsel's letter above-mentioned, it is clear that there was a mistake as regards the time within which the Notice and Grounds Of Appeal should be filed and served, and this mistake was as a result of the oversight of the recent new Rule Of Court governing Appeals from the Master."

The letter referred to in paragraph 6 reads as follows:

"Messrs Williams & Williams,
Solicitors,
64 East Street,
KINGSTON.

Dear Sirs,

Re: Pethro Brown v. Ernest Neil.

The Notice of Appeal in this case was filed and served on the 26th August, 1969, which was within the six weeks' limit laid down by the Court of Appeal Rules, 1962, for the filing and serving of Notice of Appeal from any final Judgment or Order in the Supreme Court. I have just discovered, however, that, according to Rule 3 of the Master in Chambers Rules, 1966, this Notice of Appeal should have been filed within seven days, since the Supreme Court Order, being appealed against was made, not by a Judge, but by the Master. Why there should be this difference in the Rules concerning the length of the period within which an Appeal from a Judge, and an Appeal from the Master, must be filed, it is difficult to understand. This novel Rule was made a Rule of Court in Jamaica on the 6th December, 1966, and the innovation completely escaped me, hence the mistake. That is why I advised that the Appeal, being from a Final Order, in contradistinction to an interlocutory Order, should be filed and served within six weeks from the date of the making of the Order.

In view of the new Rule governing Appeals from the Master, however, and so as to regularise the position, it will now be necessary to make application to the Court of Appeal, by virtue of Rule 9 of the Court of Appeal (Amendment) Rules, 1963, for extension of time within which the Notice of Appeal and the Record should have been filed. The Court of Appeal has very wide powers in this direction. This application should be made without delay, and the procedure is by way of Summons supported by an Affidavit.

Had the hearing of the Originating Summons been before a Judge of the Supreme Court, as I had advised, and not before the Master, this situation would not have arisen. Indeed, this very point as to whether the Originating Summons should have been heard by a Judge and not by the Master, constitutes Ground 2 of the Appeal.

I hasten to send you this letter so that the necessary steps may be taken immediately to regularise the matter.

Yours faithfully,

(Sgd) E.C.L. Parkinson, Q.C. "

The facts in the affidavit and the letter represented the material upon which the Court was being asked to exercise its discretion. The inadequacy of this material is obvious. At the outset of his submissions in support of the application, Mr. Parkinson recognized that without further information as to the history and the subject matter of the litigation the court would be unable to grasp the factual basis of his argument. With the consent of counsel for the respondent, additional facts were supplied to and noted by the court. The following sequence then emerged:

16. 7. 69. In an order on an originating summons, the Master in Chambers purported to interpret the provisions of a will made by the father of the applicant, and in which the respondents were the executors. This order was adverse to the applicant. It was a final order.

26. 8. 69. Notice of appeal from the order of the master was filed.

19. 10. 69. The record was settled.

21. 10. 69. An order was made in chambers extending the time within which to file the record to 15. 12. 69.

9. 12. 69. The record was filed.

6. 1. 70. Counsel discovered the error in failing to give notice of appeal within 7 days as required by rule 3 of the master in chambers rules, 1966, and wrote the letter exhibited with the affidavit.

17. 1. 70. A summons was filed applying for extension of time within which to file and serve notice and grounds of appeal.

3. 2. 70. The summons was heard in Chambers by the President who reserved his decision.

24. 9. 70. In an oral judgment the President dismissed the summons, on the ground, we were told, that the application was not "in any cause or matter pending before the court", and so not within the competence of "a single judge of the court" as provided in rule 33(1) of the Court of Appeal Rules, 1962.

19. 11. 70. The present notice of motion was filed.

During the submissions of Mr. Parkinson, the court learnt further that litigation between the parties concerning the will commenced in 1960 with the filing of an action in the supreme court by the applicant to set it aside. The will was pronounced valid, and this finding was upheld in the Court of Appeal on 4th March 1968.

The main argument advanced in support of the motion was that in fixing the time within which to appeal from a decision of the master at 7 days from the date when the decision was made, the Master in Chambers Rules, 1966 had introduced a procedure which was novel, inconvenient, and misleading. It had also created an anomaly in that if the appeal had been from a decision of a judge and not the master, by virtue of rule 13 (b) of the court of appeal rules, 1962, the appellant would have had six weeks within which to file his notice of appeal. Mr. Parkinson contended that the time within which to appeal from an order of the master was too short. The legal advisers of the applicant had been inconvenienced. They had also been misled. They had made a genuine mistake. Such a mistake had been held in Gatti v. Shoosmith [1939] 3 All E.R. 916 to be a proper ground for allowing the appeal to be effective though out of time.

The court intimated that merit in an appeal was also a valid consideration, and said that having regard to the history of the litigation some information in this respect would have been helpful. Mr. Parkinson took up the stand that the court was not concerned with the merits of the case or the probability of success or otherwise. He relied upon a statement of Sir Wilfrid Greene, M.R. to that effect in Gatti v. Shoosmith at p. 920 ibid. He also submitted that by failing to object to the making of the order of October 21, 1969 extending the time within which to file the record, the respondents were estopped from objecting to the application. In effect, Mr. Parkinson urged that the court had no alternative but to give leave to appeal. He suggested that if, nevertheless, the court wished to be satisfied as to the merits of the appeal, this could be secured by reference to ground 2 of the grounds of appeal which had been filed with the record. This ground questioned the jurisdiction of the master to make the order and raised up a matter of the first importance. No authority was cited for the proposition that upon the mere challenge to the jurisdiction of a tribunal, and without showing the grounds for that challenge, a point of merit in an appeal from that tribunal had been disclosed. In reply to an inquiry, the court was informed that the point as to his jurisdiction was not taken before the Master.

In his reply, Mr. Robinson questioned the seriousness of the applicant's intention to prosecute the appeal. He did not dispute that by filing the notice of appeal within the time prescribed for appealing against a decision of a judge in chambers, the applicant had shown such an intention, but he queried its continuity. He pointed out that following upon discovery of the mistake occasioned by failure to comply with rule 3 of the Master in Chambers Rule, 1966, the applicant had blundered in the course taken to rectify that mistake. The procedure should have been by motion to the court instead of by summons before a single judge. There had been delay for which the applicant could not be held responsible. Nevertheless, with knowledge of the protractions which had already occurred, the applicant allowed fifty-five days to elapse from the date when the summons was dismissed before filing the present notice of motion. Mr. Parkinson's letter of January 6, 1970 showed that the need for expedition in applying to the court was realized. In the absence of an explanation for the procrastination after the summons was dismissed, the court was entitled to consider that however serious may have been the intention

in August 1969 to prosecute the appeal, this serious intention had not been persisted in after September, 1970. On the authority of the decision of this court in City Printery, Ltd. v. Gleaner Co., Ltd., (1968) 13 W.I.R. 126, Mr. Robinson invited the court to balance this consideration against the exercise of the discretion. He also submitted that the stand which was taken in connection with the merits of the appeal was mistaken. He drew attention to another decision of this court in Martins Tours, Ltd. v. Senta Gilmore (April 1969) 14 W.I.R. 136. This case also, was an application for leave to appeal against decisions of the master. The master had dismissed two summonses to set aside the service of a writ. Notice of appeal was given within the time prescribed by the Court of Appeal Rules, 1962, but not within seven days from the date of the master's decision as provided in rule 3 of the Master in Chambers Rules, 1966. The omission to file the notice of appeal in time was due to the mistake of the legal representatives of the applicant. The case is on all fours with the instant case. Counsel for the applicant referred to Gatti v. Shoosmith and placed the same reliance upon that case as had Mr. Parkinson. In disposing of that submission Waddington P. said at p. 137

> "I agree, on the facts of the instant case, that this case is one in which the court would ordinarily follow Gatti v. Shoosmith and grant leave to appeal. With great respect, however, I disagree with the proposition that in considering whether or not to exercise its discretion to grant leave the court was not concerned with the merits of the case. In my view, this is a material factor for the court's consideration as it would be a complete waste of time and expense to grant leave to appeal in a frivolous or completely unmeritorious case. In my view, if the court is to exercise its discretion to grant leave, the applicant must satisfy the court that there is at least a prima facie arguable ground of appeal."

The judgment then considered the submission that there was merit in the proposed grounds of appeal against the master's orders, and found that the first summons was obviously meritorious and ought not to have been dismissed, but that the second summons was without merit and was properly dismissed. For this reason, leave to appeal against the decision in the first summons was granted, but refused in respect of the decision in the second summons.

The approach of Mr. Robinson is in accord with authority. In exercising the power in rule 9 of the Court of Appeal rules, 1962 "to enlarge or abridge the time appointed .... for doing any act or taking any proceeding

upon such terms (if any) as the justice of the case may require", the court must act judiciously and judicially. It must strive to order what is fair and reasonable in all the circumstances. It should not appear to have acted by whim. It must proceed in accordance with recognizable principles. At the same time it must be alert to secure its discretion from being imprisoned within precise limits by a too rigid application of principle. As Bowen, L.J. said in Gardner v. Jay 29 Ch.D. 50, 58:

> "When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so?"

In his speech in Evans v. Bartlam [1937] A.C. 473, 488, Lord Wright quoted this passage with approval and continued:

> "It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another."

In Forbes v. Bonnick R.M. Civil Appeal No. 20/68 of 29th July, 1968 (unreported) after reference to these passages in the judgments of Bowen L.J. and Lord Wright, it was pointed out that :

> "Of the several considerations which the court may legitimately make in order to determine the direction in which its discretion ought to be exercised, the first is whether the appellant has satisfied the court of his serious, continuing intention to prosecute the appeal. An appellant who applies to the court, after the most inordinate delay from which the only reasonable inference is that he had abandoned his intention to prosecute the appeal, could scarcely hope for exercise of the discretion in his favour, except in the most rare and exceptional situation."

Mr. Robinson was therefore right in contending that it was incumbent upon the applicant to show that the serious intention to prosecute the appeal which could have been attributed to him upon the giving of the notice of appeal in August 1969 had continued up to the time of the filing of the notice of motion in November 1970. Delay in acting was a sign that that intention may have faltered. The affidavit in support of the motion should therefore have contained material which was capable of explaining away the adverse signifi-

cance of the circumstance that after the summons was dismissed by the President, fifty-five days had been allowed to elapse before the notice of motion was filed.

Mr. Robinson was also correct in the views which he suggested in connection with the merits of the appeal. To quote again from Lord Wright in Evans v. Bartlam (ibid 489) - a case concerned with the exercise of the court's discretion to set aside a judgment obtained by default -

> "The primary consideration is whether (the applicant) has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

The same consideration applies when there appears to have been an 'erroneous adjudication'. This is illustrated by the decision in Forbes v. Bonnick where it was shown that, on a point of law, the appellant had a strong arguable case in which the probabilities of success on appeal were distinct. This was the major consideration which moved the court in that case to allow the appellant to file his grounds of appeal out of time. The converse applies. If no useful purpose would be served in allowing the Court's discretion to be exercised in favour of the applicant, his application will be refused. This was the position in Harold Lopez v. Geddes Refrigeration Ltd. (Supreme Court Civil Appeal No. 5/68 of 3rd July 1968). The case also, is concerned with failure by a defendant to give notice of appeal within 7 days from the date of the master's decision allowing a plaintiff to amend his statement of claim. In asking for extension of time within which to file notice of appeal, the defendant endeavoured to show that the amendments were not competent in law. His arguments were rejected and as a consequence his application failed.

Mr. Parkinson's submissions on the subject of the jurisdiction of the Master did not give rise to a Forbes v. Bonnick situation. They did not describe a distinctly arguable point. They amounted to no more than the ipse dixit of counsel that the point was meritorious. The court intimated as much to Mr. Robinson. In his reply, he was not required to discuss the subject of jurisdiction. In his closing submission Mr. Parkinson asked and was granted leave to show the intrinsic merit of his contention. Rule 2 of the Master in Chambers Rules, 1966, provides,-

> "Jurisdiction.
> The Master in Chambers may transact all such business and exercise all such authority and jurisdiction in respect of the same as may be transacted or exercised by a judge at

chambers except in respect of the following proceedings and matters, that is to say:-"

Six excepted matters are then stated.

We regret to have to say that we were altogether unable to follow Mr. Parkinson's argument that proceedings in an originating summons for the construction of a will fell within any of those exceptions. The point was novel and surprising. In similar proceedings which have come before the court, the last being one in which eminent counsel were concerned on both sides (vide Supreme Court Civil Appeal 4 of 1968 - DaCosta v. Warburton of 4th June, 1971 (The Daily Gleaner, 2nd October, 1971)) the point was not taken. It is also not without significance that objection to the master's jurisdiction was first taken in the instant case on appeal. The position does not really admit of doubt. Rule 531 of the Civil Procedure Code (Amendment) Rules 1960 of 21st March 1960 permits any person claiming to be interested under a will to apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. This rule is under Title 42 - Application and Proceedings at Chambers. Rule 532 under Title 43 - Proceedings in Chambers by way of Originating summons, empowers the executors of a deceased person to "take out, as of course, an originating summons, returnable in Chambers" for the determination of the seven questions or matters which are listed in the section. Mr. Parkinson informed us; he conceded, that the particular question which was being canvassed in the originating summons in the instant case fell within the provision of this Rule. We were at a loss to understand how these proceedings could be said to be "proceedings in respect of which jurisdiction is given by any Act specifically to a Judge in Chambers" so as to come within exception (e) in rule 2 of the Master in Chambers Rules, 1966. We were satisfied that the point as to the Master's jurisdiction which was taken by Mr. Parkinson was without merit. We thought also that he misconceived the significance of the statement in Gatti v. Shoosmith upon which he relied. The passage in which the statement occurs should be read in full. It is as follows:

> "The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the

> probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors - a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the court ought to be exercised, and, accordingly, leave will be given."

It is immediately apparent that in that case the court was concerned with a straightforward situation from which the delays and the complications of the instant case were absent. The mistake was understandable. It was due to a misinterpretation of the relevant rule. It could have happened "to anyone who was reading the rule without having the authorities in mind." The position in the instant case is different. The mistake here consisted of ignorance of the existence of relevant rules. It was not occasioned by an error of construction but by a failure in the legal representatives of the applicant to inform themselves on matters which were of decisive importance. The error in Gatti v. Shoosmith is understandable but the failure in the instant case is inexcusable because when the innovation of master in chambers came about in Jamaica in December, 1966, it was the duty of all legal practitioners to acquaint themselves with the rules governing the incidents of that new office. Furthermore, prior to the dismissal of the originating summons on July 16, 1969, this court had dealt with at least two cases in which the effect of failure to appeal within the time limited from decisions of the Master was discussed. It is also the duty of practitioners to take all such steps as are necessary to enable them to be informed of the pronouncements made from time to time by this court. A mistake which is in terms of breaches of these duties is not a satisfactory excuse for failure to act in accordance with the law.

In our view therefore, the explanation for the mistake which was provided in the solicitor's affidavit and counsel's letter did not give rise to a consideration which favoured the exercise of the discretion. We were not convinced that seven days was an inconveniently short period within which to

give notice of appeal. The complaint was not established.

The considerations which a court may allow to guide its discretion must be founded on a substratum of fact. The material upon which the discretion may be exercised must be sufficient. Otherwise, the discretion will be withheld. Ratnam v. Cumarasamy [1965] 1 W.L.R. p.8. That is the situation here. The material was insufficient. The question of whether the respondents had waived their right to object to the motion could not affect the matter. The application was bound to fail.