JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 14/85

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

BETWEEN	THEODORE DAVIS	-	PLAINTIFF/APPELLANT
AND	RANSFORD WHITE	-	1st DEFENDANT/RESPONDENT
	AND		
	DONALD MURRAY	-	2nd DEFENDANT/RESPONDENT
	AND		
	PORTMORE BLOCKMAKING CO. LTD.	-	3rd DEFENDANT/RESPONDENT

Dennis Goffe for 3rd Defendant/Respondent

David Muirhead, Q.C. and Enos Grant for Plaintiff/Appellant

May 9, & 27, 1985

ROWE, P.:

By notice of motion dated April 24, 1985, the 3rd defendant/respondent sought an order that the notice and grounds of appeal filed by the plaintiff/appellant on April 9, 1985 be struck out on the ground that the time for appealing had expired. We dismissed the motion but made no order as to costs and gave leave to the 3rd defendant/respondent to file and serve a respondent's notice under Rule 14 of the Rules of the Court of Appeal within 14 days thereof.

Walker J. assessed damages against the respondents in favour of the appellant on June 14, 1984 in the sum of $102,272 and made an order in respect of interest. On November 26, 1984, the attorneys for the 3rd defendant/respondent sent a cheque to the attorneys for the appellant for the sum of $108,391.61 under cover of a letter which began -

> "We enclose our cheque for $108,391.61. The cheque is sent in full and final settlement of the judgment herein, calculated as follows:"

Then follows a calculation which took into account the award of interest, and the letter ended with the request:

> "Please send us your receipt and a note of your costs."

No reply was ever received to that letter, neither was the cheque returned.

An attested copy of the final judgment, as also a copy of the notice and grounds of appeal, were served upon the attorneys for the 3rd defendant/respondent on April 15, 1985 and this has led to the complaint that the notice of appeal is out of time and ought to be struck out. Mr. Samuels filed an affidavit seeking to account for the delay on two bases: firstly, that counsel's opinion which had been sought on the question of whether the plaintiff should appeal against the award of damages (as being too low), only became available in January 1985, and secondly, that the plaintiff was away from home between January and April and could not be contacted to give instructions.

Prima facie, the notice and grounds of appeal filed on April 15, 1985, are perfectly in order, as complying faithfully with the provisions of Rule 13 of the Court of Appeal Rules. It is provided in this Rule that:

> "Every notice of appeal shall be filed and a copy thereof shall be served under paragraph (4) of Rule 12 hereof within the following periods (calculated from the date on which judgment or order of the Court below was signed, entered or otherwise perfected), that is to say:
>
> (a) in the case of an appeal from an interlocutory order, fourteen days:
>
> (b) in any other case, six weeks."
>
> (Emphasis supplied).

As the judgment in the instant case was a final judgment the applicable period was six weeks. From what date should the 6 weeks be counted? Mr. Goffe says, from 14 days after June 14, 1984 as it was the duty of the appellant within that 14 day period to draw up and enter the judgment. This duty, he says, is imposed by section 579 (2) of the Judicature (Civil Procedure Code) Law which reads:

> "Subject to the provisions of section 495 every judgment or order shall unless otherwise ordered be drawn up and entered by the party having the carriage of such judgment or order or his solicitor within 14 days from the date thereof, and if any judgment or order shall not have been drawn up and entered within the time aforesaid the Registrar shall report to the Judge in writing as to the reason why the provisions of this subsection have not been complied with and whether in his opinion any and which of the parties or their solicitors are responsible for the delay, and thereupon the Judge may direct such parties or solicitors to attend before him and may unless a satisfactory explanation be forthcoming make such order as to the payment of all or any part of the costs of drawing up and entering the judgment or order as he shall think fit. He may also direct that as against any party responsible for such delay the time for appealing from such judgment or order shall run as from the date when the same ought to have been drawn up and entered in accordance with this subsection."

Section 579 (4) of the Judicature (Civil Procedure Code) Law provides an indirect sanction against delay in that under its provisions:

> "A judgment or order hereby required to be drawn up and entered shall not be acted on or enforced unless and until such judgment or order has been so drawn up and entered."

The phrase used in section 579 (2) "by the party having the carriage of such judgment or order" has been interpreted to mean, the party who succeeded in the action.

Although it was conceded by Mr. Goffe that in practice he knew of no instance when the Registrar of the Supreme Court used the powers conferred by section 579 (2) to report to the Judge the failure of the party having the carriage of the judgment to enter the judgment within 14 days, he nevertheless strongly submitted that the statutory duty is upon the Registrar to make such a report and that neither the power nor the duty is placed upon the unsuccessful party to enter the judgment, or to tell the Registrar that he, the Registrar, must do something to see that the judgment is entered.

In argument I suggested that the sensible interpretation to be given to section 579 (2) was to require the party, other than the one who has the carriage of the judgment, to draw the Registrar's attention to the delay and thus to motivate the Registrar to action. Mr. Goffe has since furnished a copy of the judgment of Swinfen Eady J. in Re The Empire Guarantee and Insurance Company Ltd. [1912] W.N. 92, which dealt with Order LXII Rule 14 (a) of the Rules of the Supreme Court in England. The judgment reads in part:

> "In my opinion, this order falling to be made under Order LXII r. 14 (a), that rule must be observed. It was intended to prevent the delay, as to which complaints had been made, in drawing up orders in the Chancery Division. In my opinion it is the duty of the registrar, as soon as fourteen days have lapsed, to report the delay to the Court; it is not his duty to wait week after week and see whether the parties assist in settling and passing the order and then subsequently report delay. The Order means that when a fortnight has elapsed and the order has not been passed and entered, it is then the duty of the registrar to draw the attention of the judge to the delay at once. I make these observations because I am not sure that is the view always entertained in the registrar's office."

This opinion was expressed upon a rule which has a substantially different context from that of section 579 (2) of the Judicature (Civil Procedure) Code) Law of Jamaica. Before I come to the actual terms of U.K. Order LXII r. 14 (a) let me remind that Order LXII dealt exclusively with Registrars of the Chancery Division. Not only should they attend all Chancery Courts and the Court of Appeal but by rule 2 (1) of Order LXII which was introduced in August, 1984,

> "Every order which, according to the practice at the time when these rules came into operation would require to be entered in the office of the Chancery registrars, shall for the future be filed under the direction of the [chief] registrar."

Rule 4 outlines the procedure to be followed by a party wishing to bespeak a judgment or order by providing:

> "At the time of bespeaking a judgment or order, the party bespeaking the same shall leave with the registrar his counsel's brief, and such other documents as may be required by the registrar for the purpose of enabling him to draw up the same."

It is as plain as plain can be, that in the scheme of things in which Order LXII formed a part, a Chancery Registrar was the official who actually prepared the judgments and this was one of his primary duties. Consequently one can well understand the terms of Order LXII Rule 14 (a) which state:

> "Every judgment or order shall unless otherwise ordered be drawn up and entered within 14 days from the date thereof, and if any judgment or order shall not have been drawn up and entered within the time aforesaid the registrar responsible for the drawing up of such order shall report to the judge in writing as to the reason why the provisions of this rule have not been complied with and whether in his opinion any and which of the parties or their solicitors are responsible for the delay, and thereupon the judge may direct such parties or solicitors to attend before him and may unless a satisfactory explanation be forthcoming make such order as to the payment of all or any part of the costs of drawing up and entering the judgment or order as he shall think fit. He may also direct that as against any party responsible for such delay the time for appealing from such judgment or order shall run as from the date when the same ought to have been drawn up and entered in accordance with this rule. (Emphasis supplied).

(See 1948 Annual Practice p. 1429).

The Registrar responsible for the drawing up of the order, was, said Swifen Eady J., under a duty to report to the Judge that he had not been furnished with the necessary documentation so that he could get on with his preparation of the judgment or order. This if I may say so, with respect, is a perfectly sensible decision having regard to the wording of the Rule and in the general scheme provided for the perfecting of judgments in Chancery in England. Rule 14 (a) does not deviate from the general scheme. But consider the provisions and context of section 579 (2) of the Judicature (Civil Procedure Code) Law of Jamaica. It begins

by placing the duty for drawing up and entering the judgment or order upon the party having the carriage of the judgment or order and at no point does the section place a duty upon the Registrar to prepare such a judgment or order. His duty to report delay to the judge is not founded upon the same basis as is that under Order LXII r. 14 (a) and indeed Mr. Goffe could not recall one instance when it was ever resorted to.

These are adversary proceedings. The successful party can take no coercive action to enforce his judgment until it has been perfected by being drawn up and entered. Why should not an unsuccessful party who wishes to appeal draw the attention of the Registrar to the omission by the successful party to draw up and enter final judgment? There is no provision under section 579 (2) for a person wishing to draw up and enter judgment after 14 days have elapsed to seek the leave of the court. Unless moved by the other side, why should a judge impose conditions, presumably at the time when he is making an order, on one party or the other who is ordered to draw up and enter the judgment?

Mr. Goffe posed the question: Can a would be appellant who has carriage of a judgment indefinitely extend the time for appealing by the simple expedient of not filing or entering his judgment until he is good and ready? Put in that stark form it does seem that a successful litigant could act arbitrarily or capriciously and still have the benefit of his right of appeal. But in my judgment an unsuccessful party can move the Registrar under section 579 (2) of the Judicature (Civil Procedure Code) Law and at the hearing ask the judge to order that the time for appealing be put back to the date when the judgment ought to have been drawn up and entered. That answers a part of the question. The unsuccessful party is under no obligation to satisfy any part of the judgment until the judgment is perfected. That is another partial motivating factor against unreasonable delay. A Court of Appeal has power to extend the time for appealing under Rule 9 of the Court of Appeal Rules even after the time limited for appeal has expired. A statutory right of appeal should always be liberally construed, but would a Court of Appeal grant leave to extend time in which to appeal when a trial judge has ordered that that time

should run from a date 14 days after the delivery of judgment? The answer to that I would reserve.

Under Order 42/5/5 of the Supreme Court Practice of England, in the Queen's Bench Division, it is explicit that if the party having the responsibility for the carriage of order does not draw it up within 7 days after it is made, any other party affected by the Order may draw it up. In the Chancery Division it is still the duty of the Registrar to draw up the orders and under Order 42/8/2 if there is default and the Registrar is of the opinion that the delay was caused by the conduct of any of the parties or their solicitors he may make his report to the judge.

There is authority for the proposition that "in the case of a Queen's Bench Division judgment for damages to be assessed, the time for appealing runs from the time when the final judgment is signed, entered and sealed, not when the damages are assessed." (Wills v. Harrow Ry., Feb., 28, 1904). See 1967 Supreme Court Practice: Order 59/4/1. It appears that our Supreme Court Rules on this subject "borrowed" the English provisions dealing with Chancery actions in part and made them generally applicable, without putting in to them the other Chancery provisions which have been referred to above, and they also omitted the provisions in the English Rules dealing with Common Law actions in the Queen's Bench Division which enable the unsuccessful party to apply to enter the judgment in case of delay by the successful party.

There is thus a partial gap in the Rules, illustrated by what has happened here. The plaintiff has enjoyed the benefit of having money in hand (albeit he wants more) and at the same time has had an unconscionably long period in which to decide that he wishes to appeal in as much as time runs from his entry of the formal judgment. On the other hand the defendants have paid the judgment debt (which stops interest running) and thinking the matter settled have been somewhat taken by surprise in getting a notice of appeal in it some 9 to 10 months after the hearing and some 5 months after payment. They themselves had not thought of appealing and consequently had made no

complaint about the delay in entering the Formal Judgment.

It may be opportune for the Rules Committee to reconsider the purpose and efficacy of section 579 (2) of the Judicature (Civil Procedure Code) Law. However, no ground was shown by Mr. Goffe upon which this court, could, in the light of the clear provisions of Rule 13 of the Court of Appeal Rules, make an order striking out the notice and grounds of appeal herein and we accordingly dismissed the motion.

An intimation from the appellant when he received the cheque from the third defendant/respondent's attorneys that he would keep the money but would seek for an enlarged sum on appeal would seem to be the more acceptable professional practice. No such intimation was given, and in these circumstances we made no order as to the costs of this motion, we also gave the third defendant/respondent leave to file a respondent's notice out of time, should they wish to do so.

CARBERRY, J.A.:

I agree.

CAMPBELL, J.A.:

I agree.