JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 113/2000

MOTION

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH J.A. (Ag.)

BETWEEN:	SELECT HOLDINGS LIMITED	APPLICANT
AND	PETROLEUM COMPANY OF JAMAICA LIMITED	RESPONDENT

Christopher Malcolm instructed by John Graham and Co. for the applicant

Sandra Minott-Phillips instructed by Myers Fletcher and Gordon for the Respondent

February 12 and March 5, 2001

DOWNER, J.A.

In this interlocutory appeal Mr. Christopher Malcolm moves this Court, on behalf of Select Holdings Ltd., (the applicant) to enlarge time to enable the applicant's appeal to be relisted. In order to understand these proceedings, there must be a reference to the accurate order of Walker J.A. dated 21st November 2000 in Chambers which reads:

> "1. The Appellant provides the Respondent with security for the costs of this appeal in the sum of $168,000 within 28 days of the date hereof, failing which this appeal do stand dismissed with costs to the Respondent, without further order.

2. The sum of $168,000 aforesaid be paid to the Respondent's attorney-at-law and be held by them in escrow in an interest bearing account in a commercial bank pending the outcome of the appeal.

3. The appeal be stayed for 28 days from the date hereof.

4. The costs of this application be the Respondent's."

There is no dispute that the money was not paid within the prescribed time which lapsed on or around 19th December, 2000. In fact, the first time the money was tendered was on 2nd February 2001 in this Court before Downer, Harrison and Langrin JJA; and at that time Mrs. Minott-Phillips for the respondent refused it as being out of time. She further contended that even if it had been paid on time, she would have insisted on a manager's cheque. The manager's cheque from Citi Bank is now ready.

The Court of Appeal Rules 1962 ("the rules") are relevant. The definition section of the rules, Rule 2 states that:

> "appellant" means the party appealing from a judgment, conviction sentence or order and includes his legal representative.

The applicant is an appellant. Its appeal was put on the register of appeal pursuant to Rule 8(1) and the hearing set for 12th February 2001. It remained on the register until this Court has adjudicated on the matter. Although the appeal is provisionally dismissed because the security for costs was not tendered in time, it is open to the applicant to invoke Rule 9(1) of the rules to seek enlargement of time, as well as to obtain a departure from the rules and rely on the inherent jurisdiction of the Court. Be it noted the caption under which Rule 9 falls reads Appeals Generally. Here is how Rule 9(1) is worded:

> "9.-(1) Subject to the provisions of subsection (3) of section 15 of the Law and to rule 23 of these Rules, the Court shall have power to enlarge or abridge the time appointed by these or any other

> Rules relating to appeals to the Court , or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these or any other Rules relating to appeals to the Court in any other way where this is in the interests of justice." [Emphasis supplied]

On the face of it, the ample wording of this rule permits an appellant as an applicant, to seek enlargement of time when time was expired. This rule also expressly recognises the inherent jurisdiction of this Court to permit an applicant to have a hearing on the merits if the interests of justice so warrant.

Rules 9(2) and (3) set out the machinery for applications. They read:

> "(2) Save as may be otherwise expressly provided, applications to the Court under this rule shall be made by Motion, notice of which shall be served on all the parties to the proceedings at least 7 clear days before the day named in the notice for hearing the motion.
>
> (3) Every motion under the preceding paragraph shall be supported by affidavit, a copy of which shall be served with the notice of motion, setting out concisely the reasons why the act or proceeding was not done or taken within the prescribed time."

It is against this background that rules 33 and 35 dealing with Applications must be considered as the instant application is made pursuant to these rules. Rule 33 reads:

> "33.(1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application, make orders for –
>
> (a) giving security for costs to be occasioned by any appeal;
> (b) leave to appeal in *forma pauperis;*
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;

> (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
>
> (e) extension of time;
>
> and may hear, determine and make orders on any other interlocutory application.
>
> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court."

The important point to note is that, because the order is made by a judge in Chambers and may be discharged or varied by this Court and it is in the nature of a conditional order. If there be no application to the Court to discharge or vary the order then the matter is concluded. If there is an application to enlarge time, as in this instance, then the Court must exercise its jurisdiction in the interests of justice.

Turning to Rule 35(1) for the specific provision as regards security for costs it reads:

> "35.(1) Before an application for security for costs is made, a written demand shall be made by the respondent and if the demand is refused or if an offer of security is made by the appellant and not accepted by the respondent, the Court shall in dealing with the costs of the application consider which of the parties has made the application necessary.
>
> (2) An application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter.
>
> (3) An order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs."

Rule 35(3) is important in demonstrating that compliance is important but it does not reduce the force and effect of rule 9(1) aforementioned which permits enlargement of time or a departure from the rules. The gist of the applicant's case is an enlargement

of the 28 days ordered by Walker J.A. on 21st November, 2000 in the interests of justice.

The facts

The managing director of the applicant states his case concisely. He said:

> "4. That further to the Order of the Honourable Mr. Justice Walker, J.A. I made every effort on behalf of the Appellant to secure the said sum of $168,000.00 but my efforts notwithstanding I was unable to secure the funds within the time allowed.
>
> 5. That the appellant is and always has been interested in pursuing its appeal and has complied with the requisite formalities and the Record of Appeal was filed on December 8, 2000.
>
> 6. That the appellant has secured the funds required and is now in a position to pay over to the Respondent's attorneys-at-law the said sum of $168,000.00."

I find that this is an honest statement indicating that financial difficulties were such that it was impossible for the applicant to tender payment of $168,000.00 within the time prescribed by the order of Walker J.A. However, there was compliance with rule 9(3) supra.

It is sufficient to advert to the applicant's Endorsement on the Writ to grasp that this claim is serious. It reads:

> "The Plaintiff, the owner and occupier of all that parcel of land known as lot numbered 6 part of Portmore in the parish of Saint Catherine, registered at Volume 1203 Folio 185 of the Register Book of Titles, claims against the Defendant, the owner of the adjoining premises, to recover damages for negligence, nuisance, trespass and breach of the rule in RYLANDS v FLETCHER for that the Defendant caused and/or permitted hazardous contaminants consisting of oil, grease, petroleum fuel, diesel oil, and assorted hydrocarbons which are normally stored on the Defendant's premises to escape therefrom and enter onto the Plaintiff's adjoining land and permeate the soil and as a consequence has caused the Plaintiff to suffer loss and damage and to incur considerable expense.

AND THE PLAINTIFF CLAIMS:

1. AN INJUNCTION to restrain the Defendant, its servants, agents or any persons under them from doing the following acts or any of them, that is to say, carrying on or permitted to be carried on upon its premises the storage of chemical products including gas oil, gasoline, diesel oil or other hazardous hydrocarbons in such a manner so as to cause or permit them to escape onto the Plaintiff's said land and/or so as by the discharge of the said hazardous chemicals to cause damage to the Plaintiff's said land.

2. Damages

3. Further or other relief;

4. Costs."

Record J. made an order against the applicant. It reads thus:

"1. This action be dismissed and struck out as an abuse of process of the court.

2. The Plaintiff's summons dated the 4th day of May, 2000 is dismissed.

3. The Plaintiff pay the costs of both summonses and of the action generally.

4. Leave to appeal granted to the Plaintiff."

The applicant wishes to be heard on the merits so that the above order in the Court below may be set aside.

The authorities

The issue is one of construction of the relevant rules and I would unhesitatingly hold that this Court has power to enlarge "unless" orders generally and in particular when the specific time has been made in the order for security for costs. There are three statements of principle to be found in the judgment of Roskill LJ in **Samuels v Linzi Dresses Ltd.**[1980] 1 All ER 803. The first reads thus at page 808:

"Lord Selborne LC described **Whistler v Hancock (1878) 3 QDB 83** and **Wallis v Hepburn (1878) 3 QBD 84**

as very different from the instant case. He said in **Carter v Stubbs 6 QBD 116 at 118:**

> 'In those cases the order dismissing the action was in force and not appealed against, and also there was no application to enlarge the time for appealing, but some other orders were asked to be made for extending the time for doing something in the action, and it was there held rebus existentibus that there was no power to make such orders, as the action was no longer in existence. Those cases have no application here, where the form of the order is for enlargement of the time for appealing against the order dismissing the action and an Order of this kind is within the meaning of Order LVII., rule 6, which expressly says that such enlargement may be ordered after the expiration of the time allowed for doing the act'."

The second reads thus at 809-810:

> "Lord Denning MR, after referring to **Manley Estates Ltd v Benedek [1941]1 All ER 248, said in R.v. Bloomsbury and Marylebone County Court ex parte Viller-West Ltd. [1976] 1 All ER 897 at 900, [1976] 1 WLR 362 at 366.**
>
> > 'I have one further observation to make. It is about **Whistler v Hancock (1878) 3 QBD 83**. It seems there to be suggested that if a condition is not fulfilled the action ceases to exists, as though no extension of time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again, by extending the time. In my opinion, the county court judge had ample jurisdiction to make the order he did'."

The third statement of principle was made by Roskill L.J. At 812 he said:

> "In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored."

Conclusion

An authority easily distinguished is **Jannie Ricketts and Others v Barclays Bank D.C.O. and another** (1972) 12 JLR 823 which pertains to the failure of an applicant to secure enlargement of time to file the record of appeal for which there are special rules. There the Court in the first instance granted an "unless" Order with liberty to apply and there was non-compliance with that order within the six weeks stipulated. There was a renewed application and the Court (Henriques P. Fox and Robinson JJA) refused to exercise its discretion to grant a further extension, because, to cite the words of Fox J.A. who wrote on behalf of the Court, at page 824:

> "The liberty which was given should have been exercised before the direction for cessation of the appeal came into effect."

Such an exercise of discretion was not meant to be binding in all circumstances. It was confined to "unless orders" made pursuant to Rule 32(1) to applications to restore appeals under Rule 32(2) which are special rules dealing with enlargement of time to file the record of appeal and dismissal for want of prosecution if there is non-compliance within the time imposed by these rules. It was certainly not meant to bind this Court in circumstances where the Court was empowered to vary or discharge the order of Walker J.A. made in Chambers in accordance with Rule 35(2) (supra). Nor could it preclude this Court from relying on its inherent jurisdiction or its extensive power to extend time as explained earlier pursuant to Rule 9. If the submission of counsel for the respondent was correct that the Order of Walker J.A. in Chambers could not be varied as Rule 33 (2) mandates then a single Judge in Chambers could oust the jurisdiction of the Court of three judges to enlarge time where the interests of justice warrant it.

The applicant has explained his difficulties in obtaining the security for costs within 28 days as the order for Walker J.A. stipulated. He now has the funds required and is anxious to have his case heard. The order of Walker JA should be varied in accordance with Rules 9 and 32(2) and the manager's cheque paid over to the Attorneys-at-law on the record for the respondent forthwith. The respondent should also have the agreed or taxed costs of this application.

BINGHAM, J.A.

Having examined in draft the judgments prepared by my learned brothers, Downer, J.A. and Smith, J.A. (Ag.) I wish to state that I am fully in agreement with the reasons they have advanced and their conclusions that the appeal be allowed and that the relief sought by the applicant for enlarging the time for the lodging of the security for costs be granted. Such a power resides in the Full Court to vary or discharge any Order of a single Judge of this Court is without question, the only safeguard being that the power to act ought to be exercised with extreme caution. Whereas in this case the facts demonstrate that the applicant exhibited a conscious desire to prosecute his appeal then he ought not to be driven from the judgment seat by a mere failure to satisfy some condition fixed by a single Judge which may at the time have proven to be too onerous to be complied with.

SMITH J.A.(Ag.)

Before this Court is an application by Notice of Motion for extension of time within which to comply with the terms of an Order made by Walker J.A. in Chambers on November 21, 2000.

Background facts

The Plaintiff/Applicant was at all material times the owner and occupier of land known as Lot 6 Portmore in the Parish of St. Catherine registered at Volume 1203 Folio 185 of the Register Book of Titles. The Respondent was at all material times the owner and occupier of premises situate at Lot 1, Portmore in the Parish of St. Catherine registered at Volume 1203 Folio 180 of the Register Book of Titles. A ten (10) foot road separates the applicant's land from the respondent's premises.

On the 22nd day of March 2000, the applicant filed a Writ against the Defendant/Respondent seeking to "recover damages for negligence, nuisance, trespass and breach of the rule in **Rylands v Fletcher** for that the Defendant caused and or permitted hazardous contaminants... stored on the Defendant's premises to escape therefrom and enter onto the Plaintiff's adjoining land and has caused the Plaintiff to suffer loss and damage... ."

The Defendant (Respondent) in its defence states inter alia, that prior to the end of March 1992, the Plaintiff (Applicant) made an allegation of contamination of the land referred to in paragraph 1 of its Statement of Claim in respect of which the Plaintiff (Applicant) sued Petroleum Corporation of Jamaica Ltd. in Suit Co. CL 192/S-124. The Defendant (Respondent) is a wholly owned subsidiary of Petroleum Corporation of Jamaica Ltd.

On the 20th March, 2000, almost eight (8) years after its commencement, Suit No. CL. 1992 S-124 was discontinued by the Plaintiff (Applicant) after the Plaintiff's attorneys were served with an application for dismissal of the action for want of prosecution.

It is the contention of the Defendant that this action is an abuse of the process of the court. On the 18th October 2000, Reckord J. dismissed and struck out the Plaintiff's action as an abuse of process. Leave to appeal was granted.

On the 21st November 2000 on the application of the Defendant/Respondent Walker J.A. Ordered that:

> "1. The Appellant provide the Respondent with security for the costs of this appeal in the sum of $168,000.00 within 28 days of the date hereof, failing which this appeal do stand dismissed with costs to the Respondent, without further order.
>
> 2. That the sum of $168,000.00 aforesaid be paid to the Respondent's attorneys-at-law and be held by them in escrow in an interest bearing account in a commercial bank pending the outcome of the appeal.
>
> 3. The appeal be stayed for 28 days from the date hereof.
>
> 4. The costs of this application be the Respondents."

The Order was not complied with.

The validity of this order is not challenged before us. Neither is this Court being asked to discharge the order.

On the 5th of January 2001, the applicant filed the Notice of Motion seeking an extension of time within which to comply with the said order. In an affidavit in support of the Motion Mr. Adrian Genus the managing/director of the appellant stated, "I made every effort on behalf of the appellant to secure the said sum of $168,000.00 but my efforts notwithstanding I was unable to secure the funding within the time allowed." He further stated that the applicant has now secured the funds required and is now in a position to pay over to the respondent's attorneys-at-law the said sum.

Submissions

Mr. C. Malcolm for the applicant referred to Rule 9 of the Court of Appeal Rules, 1962 ("the rules") and submitted that this Court has jurisdiction to extend the time within which to comply with an "unless order" although the time fixed had expired. He also relies on Rule 33(2) as empowering the Court to enlarge time. It is also his contention that the Court always has jurisdiction over its own Orders and has the inherent power to amend or vary those orders. He urges the Court to hold that the applicant's impecuniosity is a good ground for granting the extension sought. The applicant, he pleads should be given the opportunity to fully ventilate its case. If the application is granted this would automatically lead to the restoration of the appeal.

He relies on the following cases . **Samuels v Linzi Dressers Ltd.** (1980) 1 All ER 803, **Martin v Chow** 34 W.I.R. 379 and **Gordon v Yorke, Habib Elias v Yorke (No.2)** 35 W.I.R. 312.

Mrs. Sandra Minott-Phillips for the Respondent submits that the Court of Appeal should adopt a stricter approach in dealing with applications for security for costs than obtains in the Supreme Court.

In the Supreme Court the form of the order is that the action be stayed pending payment of security whereas in the Court of Appeal the statutory form of the order is that in the event of failure to pay, the appeal do stand dismissed with costs to the respondent without further order.

It is her contention that at the time when this Motion was filed, there was no appeal to this Court since the consequence of non compliance is the dismissal of the appeal. She submits that Rule 9 only applies to "appeals to the Court" and therefore cannot be invoked by the Applicant since the appeal was dead. See **Whistler v. Hancock** (1878) 3 QBD 83. She sought to distinguish **Samuels v Linzi Dresses**

Ltd. The Applicant she argues, should have applied for extension under Rule 33(2)or Rule 9(1) within the 4 week period given for compliance.

After we had reserved judgment Mrs. Minott-Phillips brought to our attention the case of **Jannie Ricketts and Others v Barclays Bank D.C.O. and Another** 12 JLR 823. In that case the Court of Appeal (Henriques P., Fox and Robinson JJA) held that where the Court of Appeal extends the time within which the record of appeal may be filed and order that upon failure to file the record within the extended time allowed "the appeal shall cease and determine", the appeal cannot be revived if the appellant fails to comply with the condition attached to the extension of time granted.

Analysis of the law and submissions

Rule 9(1) of the Court of Appeal Rules applies to appeals generally, it reads:

> "9.-(1) Subject to the provisions of subsection (3) of Section 15 of the Law and to rule 23 of these Rules, the Court shall have power to enlarge or abridge the time appointed by these or any other Rules relating to appeals to the Court, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these or any other Rules relating to appeals to the Court in any other way where this is required in the interests of justice" (emphasis mine).

By this Rule the Court has the power:

(i) to enlarge or abridge the time appointed by these or any other Rules relating to appeals, or;

(ii) to enlarge or abridge the time fixed by an order enlarging time for doing any act etc.

As I understand it, Rule 9 does not empower the Court generally to enlarge or abridge the time appointed or fixed by a single Judge of the Court for doing any act or taking any proceeding.

This Rule also gives the Court the power to direct the departure from these or any other Rules relating to appeals. I will return to this.

If I am right then the Applicant may not rely on Rule 9 in his application for an extension of time in which to comply with the Order of Walker JA. This is so because the time within which he should comply with the order was not appointed or fixed by any Rule relating to appeals or by an order enlarging time. Such time was fixed by a Judge in Chambers pursuant to Rule 35(3) which itself did not stipulate for the time within which the security for costs should be provided. However, he may rely on Rule 9 to the extent that it allows a departure from Rule 35(3) in any other way where this is required in the interests of justice." The words I have underlined suggest that the Court may direct a departure other than an enlargement or abridgement of the time appointed. Indeed the Divisional Court in **Whistler v Hancock** (supra) referred to Order 57 r. 6 which is partly similar to our Rule 9, and held that the Court had no jurisdiction to enlarge the time fixed by the Master. Order 57 r. 6 reads:

> "A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The Divisional Court was of the view that the facts of **Whistler v Hancock** did not fall within the express language of the rule.

An application for security for costs is made under Rule 33. Rule 33(1) provides:

> "33. (1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application make orders for –
>
> (a) giving security for costs to be occasioned by any appeal;
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) extension of time

Subsection 2 of this Rule empowers the Court to vary or discharge an order made pursuant to sub-section (1). It reads:

> "(2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court."

The order of Walker J.A. is in the form mandated by Rule 35 (3) which states:

> "(3) An order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs."

The order of Walker J.A. was made on the 21st November 2000. The time stipulated for compliance was 28 days. Thus as of the 20th December 2000 the appeal "stands dismissed."

The important question is whether or not the Court can exercise its power under Rule 33(2) after the dismissal of the appeal as a consequence of non-compliance with the "unless" Order. In other words must the exercise of the Court's discretion pursuant to Rule 33(2) be done *pendente lite?*

As I have said before the express language of Rule 9 does not in my view permit the Court generally to enlarge the time fixed by a Judge. In my judgment once the time fixed has expired and the appeal "stands dismissed" by virtue of Rule 35(3) the Court may only exercise its discretion under Rule 33(2) by directing a departure from Rule 35(3). The Court cannot invoke Rule 9 directly to enlarge the time fixed by Walker J. A. But, as said before, Rule 9 empowers the Court to direct a departure

from any Rule in any other way. The Court may therefore direct such a departure, so that non-compliance with the order will not result in dismissal.

Where such departure is directed the Court may then exercise its discretion under Rule 33(2) to vary or discharge the order made by Walker J.A.

The inherent jurisdiction of the Court

The question is, does the Court have inherent power to grant an extension of time in respect of an "unless" Order after the expiration of the time specified?

In **Whistler v Hancock** (supra) an order was made dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered it was held that the action was at an end and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim.

The decision in **Whistler v Hancock** was not a popular one. In **R.v. Bloomsbury and Marylebone County Court *Ex parte* Villerwest Ltd.** (1976) 1 WLR 362 Lord Denning M.R. was critical of **Whistler v Hancock** and expressed the view that even though the action may be said to cease to exist, the court always had power to bring it to life again by extending the time. Lord Denning M.R at p. 365 asked "whether if a man, on his way to court in time, with money in his pocket was run down in an accident, or were robbed, there was no power to remedy the injustice". Geoffrey Lane and Roskill LJJ, did not express any view about **Whistler v. Hancock**. They decided the appeal on the basis that a court had inherent power to extend time.

In **Ricketts et al v. Barclays Bank et al** (supra), the Court of Appeal (Jamaica) was apparently of the view that it had no inherent power to restore an appeal where the appeal stands dismissed as a consequence of a term attached to an order on an application for extension of time within which to file the record of appeal (p 824 (H-I).).

In that case the Court was dealing with the failure to comply with an "unless" Order in respect of the filing of the record of appeal. The Rules provide a special regime to regulate the procedure in the filing of the record of appeal. Rule 30(1) fixes the time within which the record shall be filed.

Rule 32(1) deals with default in filing record or documents; it reads:

> "32. (1) If the appellant has failed to comply with the requirements of paragraph (1) of rule 30 or any part thereof, the respondent may apply to the Court to dismiss the appeal for want of prosecution, and the Court, if satisfied that the appellant has so failed may dismiss the appeal or make such other order as the justice of the case may require."

Rule 32 (2) provides for the restoration of the appeal; it reads:

> "(2)An appellant whose appeal has been dismissed under the rule may apply by notice of motion that his appeal be restored and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit:
>
> Provided that no application under this paragraph shall be made after the expiration of twenty-one days from the date of the order dismissing the appeal."

Thus Rule 32 (2) which invests the Court with a discretionary power to restore an appeal only applies to an appeal dismissed as a consequence of an order of the Court made pursuant to Rule 32(1). Apart from Rule 32(2) the Court would have no jurisdiction to restore an appeal dismissed pursuant to Rule 32(1) unless perhaps it is shown that such a dismissal was a nullity. This is so because once the appeal has been dismissed by the Court pursuant to Rule 32(1) the Court becomes functus. Thus an appellant whose appeal has been dismissed by the operation of an "unless" Order made by the Court of Appeal pursuant to Rule 32(1) cannot in the first place invoke Rule 9 with a view to restoring the appeal. He must first by a notice of motion apply to the Court pursuant to Rule 32(2) to have his appeal restored. The proviso to

Rule 32(2) places a time limit within which the application may be made. Of course if the appellant is late in making the application under Rule 32(2) he may by virtue of Rule 9 seek to have the time fixed by the proviso in Rule 32(2) enlarged. Rules 30-32 have absolutely nothing to do with applications to a single Judge.

It is my respectful opinion that the decision in **Ricketts v. Barclays Bank** must be confined to an "unless" Order made by the Court pursuant to Rule 32(1) whereby an appeal stands dismissed as a result of non compliance. It does not apply generally to all "unless" orders and in particular does not apply to an "unless" Order made by a single Judge pursuant to Rule 35(3).

In **Samuels v Linzi Dresses Ltd.** (1980) 1 All ER 803 the Court of Appeal in England said per Roskill LJ that the **Whistler v Hancock** decision should no longer be followed. At p. 812 Roskill LJ stated:

> "In my judgment, therefore, the law today is that a court has power to extend the time where an "unless" order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the Judge in chambers whether the necessary relief should be granted or not." {Emphasis supplied]

In that case the defendants to an action failed to comply with an order of a judge sitting as a referee striking out their defence and counter-claim unless particulars were delivered within a specified time. A long list of cases was reviewed but none of them involved an "unless" Order made by the Court of Appeal or a single Judge of Appeal.

However, in my judgment this Court has inherent power to extend the time where an "unless" order has been made by a single Judge of the Court but not complied with.

This conclusion leads me to the question – should the Court exercise its discretion in the circumstances of the instant case? I feel constrained to say that I find the submission of Mrs. Minott-Phillips that this Court should take a strict approach to non compliance with an "unless" Order in respect of security for costs, very persuasive. She argues that this Court should not be as liberal as the Court below.

In my view the applicant must not only advance good and sufficient reasons for the non-compliance but must also show that exceptional circumstances existed why the application for extension of time was not made before the expiry of the time specified.

As was said in **Gordon v. Yorke** (supra) the Court must exercise its discretionary power cautiously and with due regard to the principle that orders of the Court must be strictly observed and obeyed.

In **Ratnam v. Cumarasamy** (1964) 3 All ER 933 at 935 Lord Guest stated:

> "The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

This passage was quoted with approval in **Martin v Chow**(1984)34 WIR 379 at 385(d).

What material did the appellant put before this court on which the Court may act to exercise its discretion? The managing director of the appellant has indicated that the appellant was unable to secure the money within the required time. As Mrs. Minott-Phillips submitted, the impecuniosity of the appellant is a ground for making the order for security for costs in the Court. Can it be a basis for the exercise of this Court's discretion to extend time? I can think of no reason why it should not be. The appellant has now secured the money and is now in a position to pay.

Although the appellant did not advance any reason for its failure to make the application timeously the application was made just a few days after the expiry of the specified time and at the earliest opportunity after the Christmas holidays. The interests of justice would, in my view, favour the granting of the application. I would accordingly extend the time within which to comply with the order of Walker J. A. so that the security may be given forthwith with costs to the respondent to be taxed if not agreed.

DOWNER, J.A.

Order of Walker J.A. varied in the following terms:

(1) The appellant Select Holdings Ltd. to provide Manager's cheque for $168,000 forthwith to Attorneys-at-Law on the Record set.

2. The sum of $168,000 aforesaid be paid to the Respondent's attorneys-at-law and be held by them in escrow in an interest bearing account in a commercial bank pending the outcome of the appeal.

Costs of this application be the respondent's to be taxed if not agreed.