JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT MISCELLANEOUS APPEAL NO. M. 2/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (Ag.)

BETWEEN	KEITH WILLIAMS	PLAINTIFF/APPLICANT
AND	THE ATTORNEY GENERAL	DEFENDANT/RESPONDENT

Mr. Dennis Daly for Applicant

Mr. Glen Brown for Respondent

8th, 9th April and 13th July, 1987

DOWNER, J.A (Ag.):

This was an application by Keith Williams for leave to appeal out of time against the interlocutory order of Edwards J., in the Supreme Court on 14th November, 1985. We granted the application and now put our reasons in writing. The facts which gave rise to this motion are that material amendments were sought to the Statement of Claim before the learned judge at the commencement of the trial and they were refused. In order to appeal, it was necessary to have sought and obtained leave from the judge below or the Court of Appeal pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and the usual course is to seek such leave immediately the interlocutory order had been made although it could be made within 14 days. Counsel frankly confessed that he was not aware of that statutory provision and filed and served his notice of appeal without obtaining the necessary leave. The respondent therefore

knew of the intention to appeal in good time.

In January 1987 he obtained the record and was granted leave to file it out of time on 10th February, 1987. These delays were caused because the file was misplaced in the Supreme Court Registry, and there was further delay because the judge's notes were also mislaid.

The question for determination is whether this Court ought to exercise its discretion to grant leave to appeal out of time in the face of the determined opposition from the respondent. The answer depends on whether the discretion embodied in Rule 9 of the Court of Appeal Rules 1962 Proclamation Rules and Regulations dated October 11, 1962, ought to be exercised in favour of the applicant in the circumstances of this case. The rule reads as follows:

> "(9) Subject to the provisions of subsection (3) of section 15 of the Law and to rule 23 of these Rules, the Court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way where this is required in the interest of justice."

The direct issue posed by counsel for the applicant was whether an error made without gross carelessness or dishonourable conduct ought to persuade the court to enlarge the time within which to seek leave to appeal. In the 19th century the cases seem to suggest that courts adopted a rigid posture and rarely enlarged the time, but in the 20th century there has been a more liberal approach. It should occasion no surprise therefore that Mr. Brown for the Attorney General urged the earlier authorities while Mr. Daly for the applicant relied on a modern case. It is therefore necessary to examine the cases.

The case of Highton & Others v. /Treherne 48 L.J. Report Q.B. C.P. and Exch. p. 167 is instructive. The facts

were that the applicant for enlargement of time was mistakenly advised that the time for appealing was within twelve months but the order being an interlocutory one the time was twenty-one days. Although it was on the advice of counsel that the applicant was misled, the Court of Appeal unanimously dismissed the appeal. However, the judgments show the tension created, between competing principles, one which emphasised regularity in procedure and would grant no enlargement and the other which recognized that discretion should be exercised in the interests of justice.

Here are excerpts from the judgment. At p. 168 Bramwell L.J. says as follows:

> "I cannot help thinking the rule ought to be that if the Court finds that a mistake has been made without gross carelessness or dishonourable conduct, the Court should set it right by expediting proceedings, or by an order as to costs, or in some such other way as they think fit."

Brett L.J. on the same page puts it thus:

> "In cases where a suitor has suffered from the negligence or ignorance or gross want of legal skill of his legal adviser he has his remedy against that legal adviser, and meantime the suitor must suffer. But where there has been a bona fide mistake, not through misconduct nor through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited. It seems to me obvious that the Court has jurisdiction to enlarge the time under some circumstances. Therefore, why not on the present occasion?."

Then on page 169 he based his decision thus:

> "It is a matter of necessity that we should strictly adhere to the rule laid down by the other Division, so that there may not be one rule at Lincoln's Inn and another here, which would put an end to all regularity of procedure. Therefore, on the decided cases, I think we ought not to grant an extension of time to appeal in the present case."

Cotton L.J. at p. 169 states:

> "I am very unwilling that by the mistake of his solicitor, one of the parties in a cause should be prevented from obtaining his rights, but it is most important that both Divisions of this Court should be guided by the same rule; and it has been laid down by the other] Division that such a mistake as the present is no reason for an extension of time, and therefore I think we ought to refuse this order."

But surprisingly he ends his judgment thus:

> "A better instance could not be given than is to be found in the case of Burgoine v Taylor 47 Law J. Rep. Chanc. 542; Law Rep. 9 Ch. D. 1 where through the mistake of solicitor's clerk no counsel were briefed on one side and the cause was heard ex parte, and afterwards the case was restored to the list, and re-argued. The Master of the Rolls said that all of us are liable to make an occasional slip. But if the other party had a vested interest in the consequences of the slip, the judgment in that case could not have been set aside."

The other 19th century authority cited was Collins v. The Vestry of Paddington (1880) 5 Q.B. 368 where the conflicts within the judge's breasts as regards the principle applicable in granting enlargement of time for Interlocutory appeals was again exposed, though it is to be noted that the decision to refuse the application was again unanimous. The circumstances were that on a special case being stated to the High Court on the question of entitlement to damages the defendant succeeded and the matter was remitted to the arbitrator as to quantum. The plaintiff appealed out of time because his solicitor pleaded illness and error in treating the order as final instead of Interlocutory. Baggallay L.J., was unimpressed with the explanations for being out of time and went on to express his dissent from the reasons put forward by his brother Bramwell L.J. He puts it thus at pp. 377-378:

> "The test which the Lord Justice would apply is this: has the mistake or carelessness of the applicant or his advisers been real and unintentional, and can any

> "damage which may be occasioned to the respondent by granting the indulgence be repaired by costs or otherwise? If so, grant it, if not, refuse it. This test is a good one, as I have already intimated, if applied to proceedings in the action, but it is one which, in many cases would be very difficult, and in some impossible, of application after the action has been tried. If such a test were adopted, how great would be the temptation to those who have been negligent to endeavour to conceal their negligence under a plea of illness, or accident, or even of ignorance of the law, which it was their duty to know; and how difficult would be the task imposed upon the respondent of ascertaining whether the excuses so urged are real or well founded."

It is instructive to examine how Bramwell L.J., himself states the problem and it appears at page 379 as follows:

> "If the mistake, error, or carelessness of the applicant, had been real and unintentional, and no damage had been done to the other side that could not be repaired by payment of costs or otherwise, I granted the indulgence as it is called, erroneously so called, as I think, for it seems to me a right, a thing ex debito justitae. If I believe the occasion for the application to have been wilful or mala fide, or the application itself to be, or that to alter the state of things would be irreparable hurt to the other side, I refused the application. I state this as showing the principle of my rule; to state the practice with all its qualifications and exceptions, and to its full extent would require pages. This rule I cite, not because it has my authority only, though after the thousands of cases in which I have applied it, even that might be of some value, but because I never knew it dissented from by the Courts to which an appeal from its application might have been made. <u>The reason of it to my mind is obvious, it is to do justice between the parties; it is to bring about the result that the litigant succeeds according to the goodness of his cause and not according to the blunders of his adversary.</u> It seems to me that nothing more need be said in its favour; it is for those who impugn it to say why."

The passage underlined is emphasised because this was to be the approach of the Courts in the 20th century. Thesigner L.J., agreed with Bramwell L.J., but he used words which are appropriate to the facts of the applicant's case, they are as follows:

> "It is unnecessary for me to comment in detail upon the rules annexed to the Act of 1875: for their effect has been pointed out by Baggallay, L.J.,: I gather from them that before judgment on the merits every reasonable relaxation should be allowed, but that after judgment no relaxation should be granted except for very special reasons."

Despite the decisions in these cases the expression of principles were broad enough to contemplate the exercise of the court's discretion in instances of error "when dealing with applications for an extension of time for doing or taking any act of proceeding in the course of an action": per Baggallay L.J., at page 375. Revici v. Prentice Hall Incorporated and others [1969] 1 All E.R. 772 was also relied on by the respondent but it was not of much assistance as no explanation was given for the delay and that was the basis for refusing the application for a further enlargement of time.

It was not surprising therefore that Mr. Daly found an authority albeit in reply, to illustrate the application of the principles quoted previously to the facts of his case. Gatti v. Shoosmith [1939] 3 All E.R. 916 was a case where there was a misreading of a rule which led to the appeal being filed out of time. On an application for enlargement Sir Wilfred Greene M.R., at 919 said:

> "What I venture to think is the proper rule which this court must follow is that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time, and whether the matter shall be so treated must depend upon the facts of each individual case."

After taking into consideration the ample language of Rule 9 and the principle enunciated in the cases, Mr. Daly convinced us that this was a fit case for enlargement of time. The error was understandable and there would be no irreparable loss or injustice caused to the respondent. The application was therefore granted with costs to the respondent.