JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 144/2001

BEFORE: THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH, J.A.

BETWEEN:	**JUDITH GODMAR**	**PLAINTIFF/APPELLANT**
AND	**CIBONEY GROUP LTD**	**DEFENDANT/RESPONDENT**

Dennis Morrison, Q.C., and Mrs. Janet Morgan for appellant

Mrs. Sandra Minott-Phillips and Miss Helga McIntyre for respondent.

July 10, 11, 2002 & April 11 2003

HARRISON, J.A:

By way of an amended motion dated February 11, 2002 the respondent took a preliminary point before us that the appeal was not properly before this Court because it was filed out of time. The grounds on which the respondent relies are that:

" 1. This is an appeal from an interlocutory order which was perfected on November 6 2001, and in relation to which the time for appealing [under rule 13(a) of the Court of Appeal rules] expired on November 20 2001.

2. The filing of an application for leave to appeal does not prevent the time limited for appealing from running.

3. The appellant has not obtained an order for the enlargement of time for the filing of this appeal.

4. The appeal herein was filed on December 4, 2001.

5. The order made on November 29, 2001, granting leave to appeal is void and of no effect as it was made out of time with the result that the learned judge of the Supreme court had no jurisdiction to make that order."

We heard the arguments of counsel herein, dismissed the preliminary point and made no order as to costs. These are our reasons in writing.

The history of this matter is that on November 6, 2001 by an interlocutory order, Donald McIntosh, J. dismissed the appellant's application for an amendment of the statement of claim in the action. The order was perfected on November 16, 2001 and leave was granted on November 29, 2001. On December 4 2001, the appeal was filed in the Court of Appeal.

Mrs. Minott-Phillips for the respondent argued that the appeal was filed out of time and the appellant had not obtained a prior order for enlargement of time within which to file the appeal. Nor was any evidence led before the Court explaining why the application for leave was not made in time.

Mr. Morrison for the appellant, conceding that in interlocutory matters a notice of appeal filed before leave is obtained is valueless, argued that because the application for leave to appeal was filed on November 16, 2001 within 14 days of the order which was perfected on November 6, 2001 the filing of the appeal on December 4, 2001 was in time, leave having been granted on

November 29, 2001. Counsel argued further that because the respondent applied for security for costs after having filed the notice of objection by way of the preliminary point that the appeal, was filed without prior leave, the respondent was thereby taking a step in the proceedings which operated as a waiver of an irregularity. The application for security for costs is an acknowledgement that a valid appeal was in existence. The appeal was properly before the Court and the preliminary point should fail.

An appeal from an interlocutory order of a judge of the Supreme Court lies to the Court of Appeal provided that prior leave to appeal has been granted. Section 11 of the Judicature (Appellate Jurisdiction) Act, (the "Act") inter alia reads:

> "11-(1) No appeal shall lie –
> . . .
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge ...."

The specific procedure governing the time for filing such an appeal is provided by the Court of Appeal Rules, 1962. Rule 13 reads:

> "13 Every notice of appeal shall be filed, and a copy thereof shall be served under paragraph (4) of rule 12 hereof within the following <u>periods (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say;</u>
>
> (a) in the case of an appeal from an interlocutory order, fourteen days."

This Rule recognizes that prior leave to appeal must be obtained from the learned judge or the Court of Appeal. That pre-condition does not apply to appeals other than from interlocutory orders.

The "perfecting" of an interlocutory order is governed by section 579 of the Judicature (Civil Procedure Code) Law, which, in part, reads:

> "579-(1) A minute of every judgment or order, whether final or interlocutory, shall be made by the Registrar at the time when the judgment is given or the order is made and shall be approved by the Court or the judge."

The person "... having the carriage of such ... order " is accepted to be the successful party.

Accordingly, a notice of appeal from an interlocutory order filed before leave to appeal is granted, is of no effect and is valueless. It is the leave to appeal from such order which gave jurisdiction to the Court of Appeal to hear the order. This Court so held in ***Patrick v Walker*** (1966) 10 W.I.R. 110, the headnote of which reads.

> "**Held** (1) s, 10(1) (f) (now section 11(1)(f) of the Judicature (Appellate Jurisdiction) Law, 1962[J.] was clear and positive and no appeal proceedings could be commenced until leave had been granted. Any notice which may have been filed without leave being first obtained was of no effect and was completely valueless and void."

In ***Salmon v Hinds*** (1982) 19 J.L.R. 471, this Court came to a similar conclusion in dismissing an appeal from an interlocutory order, no leave having been obtained from the Court below, on the ground that the Court of Appeal had

been given no jurisdiction to entertain the appeal. In ***Henderson v Archila*** (1983) 37 W.I.R. 90, the Court of Appeal of Belize, following the Jamaican Court of Appeal in ***Patrick v Walker*** (supra) held that the failure to obtain leave to appeal, where leave is required, had the effect that the filing of a notice of appeal was a nullity. Sir John Summerfield, P. at page 93 said:

> "Any notice which may have been filed without leave being first obtained is of no effect and is completely valueless and void. It cannot be revived by the subsequent granting of leave."

However, guided by the provisions of Rule 13 that an appeal from an interlocutory order shall be filed and served within fourteen days, "calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected," it follows that prior leave to appeal must be obtained within the said fourteen days.

Although the party appealing must act with promptness, the rules and appeal provisions must be interpreted to be in harmony with each other.

Once the application for leave to appeal is filed with the Registrar within the said fourteen days, calculated from the date that the order is perfected, the grant of leave after the said fourteen days would be valid and proper. If this was otherwise, an applicant who applies for leave within the said fourteen days, and is given by the said Registrar, a date of hearing outside the said period, would be held to be out of time through no fault of his own.

The statutory right of appeal must be liberally construed: (See ***Davis v White et al*** 1985) 22 J.L.R. 309, per Rowe, P. at page 313).

The Judicial Committee of the Privy Council in the case of the Attorney General of the ***Gambia v N'Jie*** [1961] 2 All E.R. 50, had to consider the effect of section 5 of the West African (Appeal to Privy Council) Order in Council, 1949 which required that applications to the West African Court of Appeal for leave to appeal are to be made by motion or petition within twenty-one days from the date of the judgment to be appealed from.

The Judicial Committee held, on page 505, (headnote), that:

> "... on the true construction of s. 5 of the West African (Appeal to Privy Council) Order in Council. 1949, its requirements were that the notice of the motion or petition must be lodged with the court within twenty-one days from the date of the judgment appealed from."

Lord Denning, giving the judgment of the Court on page 511, said:

> "Their Lordships think that, if s. 5 is construed literally, it does seem to lead to the result reached by the West African Court of Appeal for an application remains an "intended application" until it is heard in court. But this would mean that the application itself would have to be heard within twenty-one days. That cannot have been intended. No court could bind itself to give a date for the hearing within that time. All that was intended was that notice should be lodged with the court within twenty-one days; and a copy served on the opposite party as soon as possible and in any case reasonable time before the date of the hearing. This result is reached by reading the section in this way:
>
> 'Applications for leave to appeal shall be made by motion or petition (notice of which shall be lodged with the court within twenty-one days from the date of the judgment to be appealed from), and the applicant shall give the opposite party notice of his intended application.'

Their Lordships think the section should be so read."

In the instant case, the order of Donald McIntosh, J. was perfected on November 6, 2001. The expiry date for the filing of the appeal from such interlocutory order to satisfy the requirements of Rule 13 was November 20 2001. Application for leave to appeal, as required by section 11(1)(f) of the Act, which Act does not stipulate a time limit, must be made within the said fourteen day period, in order to give to the said section and Rule 13 a sensible functional interpretation. The appellant filed her application for leave to appeal on November 16 2001. The application was in time. It follows that the order made on November 29, 2001 granting leave to appeal was equally in time, because Rule 13 requires that the notice of appeal herein should be filed within fourteen days, "... calculated from the date on which the order was perfected". The filing of the notice of appeal on December 4, 2001 on a strict interpretation of the said Rule 13 would be out of time, without an order granting an enlargement of time.

Rule 9.-(1) of the said Rules, provides:

> "... the Court shall have power to enlarge or abridge the time appointed by these or any other Rules relating to appeals to the Court."

In all the circumstances, on the application of Mr. Morrison, Q.C. before this Court, we granted an enlargement of time to December 4, 2001 thereby regarding the notice of appeal as having been filed in time: (see ***Cumbes v Robinson*** (1951) 1 All E.R. 662).

Because of our said findings we find it unnecessary to reveal our thoughts concerning whether or not the respondent was deemed to have taken a step in the proceedings thereby creating a waiver, when the application for security for costs was made.

Since our decision on July 11, 2002, the new Court of Appeal Rules, 2002, came into force. Rule 1.11(1) reads:

> "The notice of appeal must be filed at the registry and served in accordance with rule 1.15 –
>
> ...
>
> (b) where permission is required, within 14 days of the date when such permission was granted ..."

For the above reasons we dismissed the preliminary point.