

COURT OF APPEAL

Careves Investments Limited

APPELLANT

-v-

Hotel Beau Rivage Company Limited

FIRST-RESPONDENT

Michael William Forrest

SECOND-RESPONDENT

J U D G M E N T

DEPUTY BAILIFF: This is an application by the appellant for an order to strike out the Respondent's Notice, filed on behalf of the Plaintiff and dated the 28th October, 1985, on the grounds that (a) it discloses no reasonable cause of action; and/or (b) it is scandalous, frivolous and vexatious; and/or (c) it may prejudice, embarrass or delay the conduct of the appeal; and/or (d) it is an abuse of the process of the Court.

The notice complained of relates solely to the question of costs.

On the 11th September, 1985, the Royal Court rescinded the registration of the appointment of Mr. Michael William Forrest as liquidator of the appellant (First Defendant); declared the appellant (First Defendant) en desastre; and ordered that the costs of the first hearing, in January, 1985, and of the continuation, in September, 1985, be paid by the appellant (First Defendant).

The appellant or First Defendant, on the 9th October, 1985, appealed generally to the Court of Appeal asking that the judgment of the 11th September, 1985, be set aside.

The First Respondent (the Plaintiff) wishes to contend that the judgment of the 11th September, 1985, should be varied and that the cost of the first hearing and the continued hearing should be paid by Suncrest Hotels Limited and in any event not by the appellant (First Defendant) nor by the First Respondent (Plaintiff).

Article 13(c)(ii) of the Court of Appeal (Jersey) Law, 1961, provides that no appeal shall lie in a civil cause or matter without the leave of the court making the order, from any order as to costs only which by law are left to its discretion.

Albeit the First Respondent (Plaintiff) wishes to appeal as to costs only, the order of the Court of the 11th September, 1985, was not as to costs only, but dealt with the registration of the liquidation and the desastre.

The appeal entered by the Appellant (First Defendant) asks the Court

of Appeal "to order that the said judgment may be set aside and that the costs of this appeal and the hearing below be the First Defendant's costs in any event."

Thus the question of costs will be before the Court of Appeal and, not unreasonably, the First Respondent (Plaintiff) wishes to be heard on the matter.

Rule 5(1) of the Court of Appeal (Civil)(Jersey) Rules, 1964, provides that: "A respondent who, not having appealed from the decision of the court below, desires to contend on the appeal that the decision of that court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court to make, or to make in that event, as the case may be".

The First Respondent (Plaintiff) has merely availed itself of the provisions of Rule 5(1) which it is entitled to do once an appeal has been commenced by another party.

The fact that on the 28th October, 1985, the application of the Plaintiff (now the First Respondent) for leave to appeal as to costs only was dismissed by the Royal Court cannot deprive the First Respondent of its rights under Rule 5(1).

In *Ernest Farley and Son Limited -v- Takilla Limited* (1984) 1 C.A. 272 the Court of Appeal decided that when a notice of appeal and a record certifying that the notice has been duly served is lodged with the Judicial Greffier, he must file the notice of appeal and set the appeal down even in cases where an appeal only lies with leave and none has been obtained. Absence of leave required by law was a point which could be taken before the Court of Appeal at the hearing of the Appeal.

In the instant case leave was sought and was refused. The matter is now in the Court of Appeal and Rule 5(1) operates. The fact that leave was sought and refused is a point which can be taken before the Court of Appeal at the hearing of the appeal.

Rule 5(4) provides that a respondent's notice shall be served on the appellant and on all parties to the proceedings in the Court below who are directly affected by the contentions of the respondent within fourteen days after the service of the notice of appeal on the respondent. The notice of appeal was served on the 10th October, 1985. The first Respondent's notice was served on the 28th and 29th October, 1985. Accordingly, the First Respondent's notice was out of time and there should have been an application for enlargement of time. However, the point has not been taken by the Appellant (First Defendant). To the extent that an enlargement of time may be required, I grant it.

The Supreme Court Practice Vol. 1 p. 806 Order 59 paragraph 59/1/12 contains the following: "3. Orders as to costs only - No appeal lies without

the leave of the court or tribunal making the order from an order of any court or tribunal as to costs only which by law are left to the discretion of the court or tribunal (SCA 1981, S 18(1)(f) Vol 2 para 5134) Section 18(1)(f) applies if the appeal is only against the order as to costs; it is irrelevant that the original decision also dealt with other matters as to which there is no appeal.

But the section does not preclude the Court of Appeal from hearing and determining an appeal as to costs without the leave of the Judge below where it is part of a larger appeal based on grounds of substance, even if all those other grounds fail. But those grounds must be genuine and not "put in as a kind of smoke screen" to conceal the true object of the appeal (Wheeler -v- Summerfield (1966) 2 Q.B. 94, pp 106, 107, C.A.)".

Unfortunately, none of the authorities deal with the situation that arises under Rule 5(1). What we have in the instant case really amounts to a cross-appeal on the question of costs. The Supreme Court Practice shows that I should apply Article 13(c)(ii) if the appeal is only against the order as to costs, just as much as if the order itself had been as to costs only. It follows that leave was correctly sought and was refused. But here there is a larger appeal based on grounds of substance, albeit brought by another party and the question of costs therefore, is before the Court of Appeal. There is nothing in Rule 5 to restrict the area of what I may call a cross-appeal. In my judgment, therefore, the Respondent's notice, under Rule 5(1) can be restricted to the question of costs.

Counsel for the appellant (First Defendant) has not persuaded me that the Respondent's notice should be struck out on any one or more of the four grounds mentioned in the Summons. The Supreme Court practice Vol 1 page 871 para 62/2/34 contains this extract: "The discretion of the Judge must be fairly exercised, and not merely the application of some general rule (Bew -v- Bew) (1899) 2 Ch. 467. Simply to follow a general rule is not to exercise discretion (Robertson -v- Robertson (1881) 6. PD 119, p 123)". The First Respondent (Plaintiff) wishes to submit that discretion was not exercised at all and that the Royal Court simply followed a general rule. It is conceded that the parties were not invited to address the Court as to costs. Moreover, it appears to me that the third ground contained in the First Respondent's notice is worthy of argument. I cannot see that the conduct of the appeal would be prejudiced, embarrassed, or delayed by the First Respondent's notice because the whole of the appeal would be disposed of at a single hearing.

I dismiss the appellant's application and the taxed costs of the application will be borne by the appellant.