

COURT OF APPEAL

4th July, 1988

Before: Sir Godfray Le Quesne, Q.C., (President)

J.M. Chadwick, Esq., Q.C.,

R.D. Harman, Esq., Q.C.,

BETWEEN

Thomas Joseph Burke

APPELLANT

AND

Sogex International, Limited

RESPONDENT

Applications by the Respondent for an order  
(a) that service by the appellant of Notice  
of Appeal was invalid; (b) that leave to  
appeal be refused to the appellant; and (c)  
that should the Court grant leave to appeal,  
an enlargement of time within which to serve  
the Notice of Appeal be refused.

Advocate R.J. Michel for the Respondent

Advocate P.C. Sinel for the Appellant.

JUDGMENT (delivered by J.M. Chadwick, Esq., Q.C.,).

MR CHADWICK: The applications before us are made in an action in which the plaintiff appellant sues the defendant, Sogex, for payment on certain bills of exchange. In the course of that action an application was made by the plaintiff to strike out the defence and counterclaim entered by the

defendant on the basis that it disclosed no answer to the plaintiff's claim. That application came before Mr Le Cras, sitting as a Commissioner, and he gave judgment on the 3rd November, 1987.

After reviewing the authorities the Commissioner held that he had a discretion whether or not to permit the defence and counterclaim to enter; and that he should exercise his discretion in favour of the defendant. Notice of Appeal against that decision was given on the 1st December, 1987, and matters proceeded for some time on the basis that that notice had been validly given. However, on the 25th April, 1988, the respondent, Sogex, issued a summons returnable before this Court, taking the point that the Notice of Appeal was invalid because the order made by the Commissioner had been an interlocutory order and no leave to appeal had been granted as required by Article 13(e) of the Court of Appeal (Jersey) Law, 1961.

Faced with this challenge to his Notice of Appeal, the appellant issued a cross-summons requiring the respondent to show cause why the appellant should not be given leave to appeal against the decision of the Commissioner and seeking an extension of time in which to file a fresh notice of appeal.

Those two summonses came before the Bailiff, sitting as a Single Judge of the Court of Appeal, on the 26th May, 1988. His decision was that the appellant's Notice of Appeal should be declared invalid on the ground that the appellant had not obtained leave to appeal as required by Article 13(e); but he went on to grant the appellant's application for leave to appeal and he extended the time for that appeal.

The present applications are brought by Sogex before this Court seeking, in effect, a review of the Bailiff's decision. The summons is dated the 3rd June, 1988, and it requires the appellant to show cause why service of the notice of appeal should not be declared invalid and, further, why the appellant should be given leave to appeal in any event and in the event that the Court should be of the opinion that leave to appeal ought to be granted, to show cause why the appellant should be granted an extension of time.

The basis of Sogex's applications, as argued before us, is that the Bailiff sitting as a Single Judge of this Court, had no jurisdiction to grant leave to appeal against the Commissioner's decision. The foundation of that argument is that the jurisdiction conferred on a Single Judge of the Court of Appeal under Article 18 of the Court of Appeal (Jersey) Law, 1961, is exercisable only in circumstances where there is already an appeal pending before the Court. It was said by Mr Michel, with force, that in a situation where leave to appeal is required under Article 13(e), but where no leave to appeal has been granted, then notwithstanding that a notice of appeal has been served there is in truth no appeal pending before the Court and, accordingly, no jurisdiction for a single Judge of the Court of Appeal to deal with the matter pursuant to Article 18.

That question turns on whether the service of a notice of appeal in a case where leave is required but not obtained, is to be regarded as a nullity or an irregularity. The point is canvassed at note 59/1/24 in the Supreme Court Practice 1988 of the United Kingdom - where the editors express the view: "As the Court of Appeal has no jurisdiction to entertain an appeal where leave is required unless leave has been obtained, the Court will raise any question of leave to appeal of its own motion (White -v- Brunton (1984) Q.B. 570). It has been held that failure to obtain leave before setting down an appeal is an irregularity only and does not render the notice of appeal a nullity (Knighthood Assurance Consultants -v- Meacher (1976) 120 S.J. 117 C.A.), where it was held that a respondent who had applied for security of costs had thereby waived the irregularity of failure on the part of the appellant to obtain leave to appeal). Sed quaere, because failure to obtain leave goes to the Court of Appeal's jurisdiction".

Regrettably, the earlier decision of the Court of Appeal in Knighthood Assurance Consultants -v- Meacher, does not appear to have been cited to the Court in White -v- Brunton, so that there is no analysis in the later case which explains the failure to apply the principle adopted in the former.

In the course of argument, this Court took the view that it is unnecessary to resolve on this application the question whether a notice of appeal served without leave (in circumstances where leave is required)

should properly be regarded as an irregularity or a nullity. The reason why that view was taken is that it would clearly be open to the appellant to make a fresh application for leave to appeal to the full court and to bring the matter of substance before the court in that way. It seemed to this Court more important to deal with the matter of substance rather than with the procedural question which is of some nicety.

In those circumstances, Mr Sinel, who appears for the appellant, has made an application before us today that he should have leave to appeal against the decision of the Commissioner. This application was made without prejudice to his contention either that he never needed such leave, or that he has already obtained it from the Bailiff. So the matter has been argued before us on the basis that the real question which we have to decide is whether leave to appeal from the Commissioner should be granted.

It seems to me that the first question is whether it can properly be said that the Commissioner was right in treating the matter as one which fell for an exercise of discretion. If he were right and if he then exercised his discretion on the correct basis, it is clear on the authorities that the Court of Appeal would be slow to interfere with his decision; and that would be a powerful factor in deciding not to grant leave to appeal. But on a consideration of his judgment, which is carefully and fully reasoned, it appears to me that there is an underlying question of law which is of considerable importance. That question is the extent to which the guidance given by the House of Lords in England in the case of Nova (Jersey) Knit Limited -v- Kammgarn Spinnerei (G.m.b.H) (1977) 2 All E.R. 463 applies in the somewhat different circumstances in this jurisdiction. And if the Commissioner were wrong in the view which he took on that matter, then the exercise of his discretion could well be said to have been flawed.

In those circumstances it seems to me that the second question which arises is whether there is a good reason to require the parties to go to trial on this point as on others, so that the question of law can be resolved first by the trial judge in the light of the evidence which he hears, and then, if the unsuccessful party desires it, by the Court of Appeal; or whether the point is one which is suitable for decision as a matter of principle on an application to strike out, and so can properly be dealt with by the Court of

Appeal by way of appeal from the Commissioner.

In considering that second question I have paid regard to the views expressed by the Bailiff in his judgment on the 26th May. He said that in important commercial matters it is essential for the Island to know from the Court of Appeal whether indeed the Royal Court was correct in the earlier case of Chestertons -v- Leisure Enterprises, (1984) Unreported J.J. 191, and whether the Commissioner was correct in following Chesterton in the instant case. On that basis he was satisfied that there were sufficiently important grounds to warrant the giving of leave at this stage.

It seems to me that the point of principle in this case can properly be decided on the pleadings; and that there is a general interest in having it decided sooner rather than later. Accordingly, I agree with the Bailiff's view that it is right to give leave to appeal against the Commissioner's judgment in this case. In these circumstances, I would extend the time for the service of a fresh Notice of Appeal.

SIR GODFRAY LE QUESNE: I agree.

MR HARMAN: I agree.

Authorities: (referred to at the hearing: \*)

(referred to in the Judgment: B)

- \* B Court of Appeal (Jersey) Law; 1961.
- \* Court of Appeal (Jersey) Rules, 1964.
- Taylor -v- Hayter (7.1.87) (J.J. Unreported 87/3).
- \* Supreme Court Practice 1988 Edit. Ord. 59.
- Ernest Farley & Son Ltd. -v- Takilla Ltd. (1984) J.J. 123.
- J.K. Fruit & Vegetable Catering Ltd. -v- Harbour Lights Hotel Ltd. (1987) (J.J. Unreported 87/252).
- Carter -v- Lapidus (1987) (J.J. Unreported 87/5).
- Cumbes -v- Robinson (1951) 1 All E.R. 661.
- \* Salter Rex & Co. -v- Ghosh (1971) 2 All E.R. 865.
- \* Haron Bin Mohd Zaid -v- Central Securities (Holdings) Bhd. (1982) 2 All E.R. 481.
- Buckle -v- Holmes (1926) All E.R. Rep. 90.
- Key -v- Bastin (1925) 1 K.B. 650.
- Papadopoulos -v- Papadopoulos (1930) P.55.
- Moran -v- Lloyd's (1983) 2 All E.R. 200.
- A.C. Gallie Ltd. -v- Davies & Walker (1986) (J.J. Unreported 86/7).
- Waring -v- Holderness (1988) (J.J. Unreported 85/88) (J.L.R. 1985-86 AN-2).
- B White -v- Brunton (1984) Q.B. 570.
- B Knighthood Assurance Consultants -v- Meacher (1976) 120 S.J. 117 C.A.
- \* B Nova (Jersey) Knit Ltd. -v- Kammgarn Spinnerei, G.m.b.H. (1977) 2 All E.R. 463.
- \* B Chestertons -v- Leisure Enterprises (1984) J.J. Unreported 191.