

COURT OF APPEAL

5th April, 1989

Before: J.M. Chadwick, Esq., Q.C., (President)
L.J. Blom-Cooper, Esq., Q.C., and
S. Kentridge, Esq., Q.C.

Between

James Barker

Appellant

And

Barclays Bank p.l.c.

Respondent

The ex parte Representation of the Appellant seeking an extension of time, within which to file a Notice of Appeal against the Order of the Royal Court of the 10th August, 1984, giving the Respondent leave to declare his movable property 'en désastre'.

Advocate R.J. Renouf for the Appellant.
Advocate W.J. Bailhache appears
forthwith for the Respondent.

JUDGMENT

THE PRESIDENT: We have before us an application by James Barker for leave to appeal out of time against an Order made in the Royal Court on the 10th August, 1984, by which it was declared that the movable property of Mr. Barker was 'en désastre'. The application is, to say the least, unusual; not only because of the lapse of time since the Order was made, but also because the 'désastre' itself was raised on the 13th December, 1984, and so has not

been in force for the past four years.

The draft Notice of Appeal which it is sought to bring recognises this latter problem in that it does not seek to set aside the Order or the Judgment; rather it asks the Court of Appeal to declare that the Order made on the 10th August, 1984, was a nullity. The basis of that application is that the Order of the 10th August, 1984, was made in circumstances in which there were grounds for the belief that the Deputy Bailiff sat without Jurats, with the consequence that the Court was not properly constituted, and further that the Deputy Bailiff proceeded on evidence contained in a purported affidavit made by Eric William Stoker on the 10th August, 1984, which, it is said, was not in fact properly sworn.

We should say at the outset that we are not satisfied that the Court of Appeal would have jurisdiction to make the declaration which is sought in the Notice of Appeal. The jurisdiction of this Court is statutory. It is conferred by the Court of Appeal (Jersey) Law, 1961, Article 12(2) of which is in these terms:

- "(i) There shall be invested in the Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter.
- (ii) Subject as otherwise provided in this law and to rules of court the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the Superior Number of the Royal Court when exercising original jurisdiction in any civil cause or matter".

Whether or not the Superior Number of the Royal Court would, prior to the enactment of the 1961 law, have had power to review the proceedings of the Inferior Number and make declarations in respect of those proceedings, we do not think that in so doing it could be properly described as exercising an appellate jurisdiction. It appears to us essential to the exercise of an appellate jurisdiction that there should be an order against which an appeal can lie.

If we are wrong in that matter then the question whether or not time for the bringing of an appeal should be extended is clearly discretionary. The matter is governed by Rule 16 (1) of the Court of Appeal (Civil) (Jersey) Rules, 1964, which gives to the Court or a Single Judge the power to enlarge time appointed by the rules for the bringing of an appeal which would otherwise be fixed at one month. (See Rule 3).

It is well-established that in exercising its discretion the Court has a number of factors to take into account. These include the extent of the delay; any explanation which is offered for that delay; the prospects of the appeal which is proposed; and any prejudice which may be suffered by other parties to the proceedings.

In the present case there is no explanation whatever for the delay between August, 1984, and a date in October, 1988, when Mr. Barker first wrote to the Judicial Greffe seeking a copy of the affidavit which had been relied upon on the 10th August, 1984.

Further, the prospects of success must depend upon the appellant establishing that the Court was wrongly or insufficiently constituted or that the affidavit was not in fact sworn. There is no sufficient evidence to establish either of these facts.

The affidavit is in the usual form. The defendant declares that he makes oath and that the contents are true to the best of his knowledge, information and belief; and he signs his name over the words "sworn by the said Eric William Stoker this tenth day of August, 1984". The defect in the affidavit - in the sense that it does not follow the usual pattern - is that there is no attestation. We do not see how a Court faced with an affidavit in that form and no other evidence could be asked to infer that Mr. Stoker was not making a true declaration when he signed to the effect that he had made oath before declaring his affidavit to be true.

The matter does not end there. The application of the 10th August, 1984, was made on behalf of Barclays Bank by their Advocate, Mr. Bailhache. He has appeared in this Court to tell us that he attended at the Royal Court on the 10th August, 1984, with Mr. Stoker; that the affidavit was in fact

sworn by Mr. Stoker before the Deputy Bailiff, either in Chambers or in Court, and that the Court was properly constituted in the sense that the Deputy Bailiff sat with two Jurats. That evidence would clearly be fatal to any prospect of success on the appeal.

It is regrettable that we were not told of these facts by counsel for Mr. Barker at the opening of this application. Counsel had been informed by Mr. Bailhache's office in advance of the application what Mr. Bailhache's account of the facts would be. We were not told this. Had we been told, as we should have been, a considerable part of the time taken up in hearing this application would have been avoided. The application is dismissed.

KENTRIDGE, J.A: I agree with the judgment which has just been given. I would like to add only one thing. In the draft Notice of Appeal one of the grounds is that the Deputy Bailiff was sitting alone. The only material placed before us which is apparently intended to support such a ground of appeal is two extracts from the "Jersey Evening Post of August, 1984", which seemed to say no more than that the proceedings took place late in the afternoon after normal court hours. If that is the basis for the suggestion in the Notice of Appeal, (and we have been directed to no other basis) then I feel bound to say that such an allegation should never have been made. It should never have appeared even in a document such as a draft Notice of Appeal. The suggestion made in it is a very serious one. As I say it seems to be completely without merit and it is unfortunate that such a suggestion was ever placed before this Court.

BLOM-COOPER, J.A: I agree with both judgments of my brother judges.

Authorities

Tett -v- States of Jersey (1970) J.J. 1461.

Hickman -v- Norton: Jersey Unreported 88/5.

Rules of the Supreme Court 0.41/1/6 and 7; 0.41/4.

Royal Court Rules, 1982, Rule 15.

Court of Appeal (Jersey) Law, 1961; Article 12(2).^d

Court of Appeal (Civil) (Jersey) Rules, 1964, Rule 16.

CARRIERS

CARRIAGE BY ROAD—international carriage—carriage between UK and Jersey

In proceedings by which the plaintiffs sought to recover for the loss of a consignment of goods in transit from the United Kingdom to Jersey, the English High Court considered whether the Convention on the Contract for the International Carriage of Goods 1956 applied to the contract of carriage, *i.e.* whether Jersey (the place of delivery) and the United Kingdom (the place of collection) were "two different countries, one of which at least is a Contracting country" within the meaning of art. 1. The Convention had been incorporated into English law by the Carriage of Goods by Road Act 1965, s.9 of which provided that the Convention could be extended by Order in Council to the Channel Islands, but it had not been extended to Jersey. The Queen's Bench Division (Sheen, J.) held that for the purposes of the Convention Jersey was not a different country from the United Kingdom. The plaintiffs appealed against that decision.

Held: Jersey was not a "different country" from the United Kingdom for the purposes of the Convention. Viewing the scheme of the Convention itself and the English Act incorporating it, it was clear that "countries" were only those that could contract (*i.e.* accede to the Convention) and that each contracting country's dependencies were to be regarded as part of that country, whether or not the Convention had been extended to them. The present contract was therefore one of domestic carriage to which the Convention did not apply.

Chloride Indus. Batteries Ltd. and States of Jersey Telecommunications Bd. v. F. & W. Freight Ltd. (English Court of Appeal, Civil Division: Dillon and Butler-Sloss, L.JJ. and Sir George Waller), June 12th, 1989.

CIVIL PROCEDURE

APPEALS—enlargement of time for appeal—factors to be considered

The Court of Appeal has a discretion to allow the enlargement of time for appeal under the Court of Appeal (Civil) (Jersey) Rules, 1964, r.16(1), in the exercise of which it will take into account factors such as the extent of the delay, any explanation for it, the prospects of the success of the appeal and risk of prejudice to other parties to the proceedings.

Barker v. Barclays Bank PLC (C.A.: Chadwick, Blom-Cooper and Kentridge, J.J.A.), April 5th, 1989.

DISCOVERY—specific discovery—affidavit in support

Every application for an order for specific discovery should be accompanied by an affidavit stating that the deponent believes, with the grounds for his belief, that the other party has, or has had, in his