

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 17 of 1988

BETWEEN:

JOHN GODDARD - Appellant
and
NATIONAL DEVELOPMENT
CORPORATION - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron (Acting)

Appearances: Dexter Theodore for Appellant
Respondent was not represented

1990: Oct. 25

JUDGMENT

ROBOTHAM, C.J.

This is an application for leave to appeal to Her Majesty in Council against a decision of this Court of Appeal given on 28th May, 1990. The matter in dispute relates to land the prescribed value of which is in excess of \$1500 within the meaning of section 108(1)(a) of the St. Lucia Constitution Order 1978.

The application for leave to appeal was filed in the Registry on the 15th June, 1990 but the appellant did not serve the respondent with notice of the intended application until the 26th June, 1990. The Registry was in no way involved in the service of this document.

Rule 4 of the West Indies Associated States - now Eastern Caribbean Supreme Court - (Appeals to Privy Council) Order 1967 reads as follows:-

"Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the appellant shall give all other parties concerned notice of his intended application.

It will be seen therefore that whilst the notice of appeal was filed within the required 21 days, the service of notice of the intended application was not served on the respondent until the 26th June, 1990, which was well outside the 21 days.

/It was.....

It was submitted by Counsel for the appellant that section 4 calls for two things to be done in relation to the appeal. Firstly the appellant must file the notice within 21 days of the date of the decision appealed and secondly, serve the other parties concerned with notice of the intended application. The use of the word "and" must be submitted, be construed as being disjunctive, and whilst the notice must be filed within 21 days, there is no time limit for serving the notice of the appeal on the respondent.

The Court drew the attention of Counsel to the case of Robertson vs Isaacs (1982) 30 W.I.R. 114. It was conceded in that case that the notice of appeal was filed within the 21 days and the argument centered around the question as to whether the form of notice of appeal as filed was sufficient compliance. The Court in holding that it was, dismissed the preliminary objection, and granted the leave to appeal.

Counsel for the appellant submitted that the preliminary objection in that case did not deal with the time for service of the notice, but with the form of the notice and was therefore distinguishable.

It was pointed out to him however that it was there conceded that the appeal was brought within 21 days. It is crystal clear that if the ~~service~~ of the notice was an act which could have been done at any time after the 21 days had passed, it would have been a simple matter to serve afresh, what was considered to be a proper notice.

In any event the judgment of Peterkin C.J. at page 116 letter (d) makes it quite clear what the preliminary objection was dealing with and I quote:-

"At the outset Counsel for the plaintiff took a preliminary objection to the procedure adopted by the defendant in relation to Rule 4. He argued that he should have been served with a copy of the notice of motion itself within 21 days...."

The notice which was served reads as follows:-

"Take notice that the above-named Grafton Isaacs intends to apply to the Court of Appeal for leave to appeal against the judgment of the Court of Appeal dated 20th July, 1981 in the above-mentioned case.

Dated 5th August, 1981."

The Court in dismissing the preliminary objection held that the notice served was a formal notice, and a clear and proper indication to the other side within the 21 days of the appellant's intended application.

/I am of.....

I am of the view that the use of the word AND in Rule 4 is conjunctive and not disjunctive as submitted by Counsel, and that both the notice of appeal, and the service on the respondent must be done within 21 days.

Counsel did not apply for an extension of time in which to effect the service, but in any event it would appear that the decision of the Privy Council in *Roulstone v Panton* (1979) 33 W.I.R. 238 would have precluded the grant of any such extension.

In that case the Privy Council drew a distinction between the condition in Rule 5(a) of the Order requiring the security for the due presentation of the appeal to be given within a period "not exceeding 90 days" and the provision in Rule 5(b) which allows for the procuring and preparation and despatch of the record to England within a period determinable by the Court.

Lord Russell of Killowen said at page 239, letter (e):-

"In their Lordships' opinion there is a crucial distinction between the two types of condition. In one case there is a maximum period of 90 days laid down by the Order in Council, and clearly the Court has no jurisdiction to alter the Order in Council by extending that period....."

The period laid down by the Order in the instant case, for the service of the notice of appeal is within 21 days and this was not done.

In the circumstances the provisions of Rule 4 of the Order in Council not having been complied with, I would refuse the application, with no order as to costs.

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal

C.M.D. BYRON,
Justice of Appeal (Acting)