

7th January, 1987.

(8/13.)

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COURT OF APPEAL

Before: J M Chadwick Esq., Q.C. (President)
D C Calcutt Esq., Q.C.
R D Harman Esq., Q.C.

Between T Appellant
And H Respondent

Application by the Respondent for an Order setting aside the Order of a Single Judge of the Court of Appeal of 1st September, 1986, granting an enlargement of time to the Appellant within which to file the Appellant's case

Advocate J A Clyde-Smith for the Respondent

Advocate G R Boxall for the Appellant

PRESIDENT: We have before us a notice of appeal dated the 10th September, 1986, given on behalf of H who, for convenience, I will call the wife although her marriage has, in fact, been dissolved. By that notice, the wife asks this Court to order that a judgment given by the Bailiff on the 1st September, 1986, be set aside.

The background to the matter, so far as material, is this - the marriage formerly subsisting between the parties was dissolved by a decree absolute made by the Royal Court on the 2nd March, 1982. In the course of proceedings under the petition for divorce, the Greffier Substitute made an order dated the 22nd February, 1982, providing for certain periodical payments to be made by the husband to the wife and for other ancillary relief in relation to property. After that order had been enforced for some three years, the wife applied for a variation order pursuant to Article 32 of the Matrimonial Causes (Jersey) Law, 1949; an order varying the terms of the 1982 order was made by the Greffier Substitute on the 4th June, 1985. The wife appealed to the Royal Court against the variation order which had been made on her application by the Greffier Substitute as she was entitled to do under Article 3 Paragraph 4 of the Matrimonial Causes Law. That appeal was heard by a Commissioner and two Jurats and they, by an order dated the 21st January, 1986, allowed the appeal and increased the amounts of the periodic payments to be made by the husband.

On the 14th February, 1986, notice of appeal to this Court against the order of the Royal Court was served on behalf of the husband. Shortly thereafter, his appeal was set down in accordance with Rule 4 of the Court of Appeal Civil (Jersey) Rules, 1964, and time began to run against the husband as appellant for the purposes of Rule 8(1) of those rules. Rule 8(1) requires that certain documents be lodged with the Court within four months.

It is common ground that the husband did not take the steps prescribed by Rule 8(1) within the period of four months provided and that, accordingly, subject to the provisions of Rule 16 of those rules, this appeal must be deemed to have been abandoned on or about the 18th June, 1986 (see Rule 10 of the rules).

On the 12th August, 1986, the husband, through his advocate, served a summons on the wife, seeking an enlargement of time within which to comply with the requirements of Rule 8(1). That application was made pursuant to Rule 16(1) of the 1964 rules which is in these terms:

The Court or a judge thereof shall have power to enlarge the time appointed by these rules or fixed by order enlarging time for doing any act or taking any proceeding on such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

It is clear that, under that sub-rule, power to enlarge time can be exercised by a single judge of this Court and that that power was exercisable on the 1st September, 1986, notwithstanding that the application itself had been made out of time.

On the 1st September, the Bailiff, sitting as a single judge of this Court, granted the husband's application for an enlargement of time and directed that the documents required to be lodged in accordance with the rules should be deemed to have been lodged on that day.

It is against this judgment of the Bailiff that the wife now seeks to appeal to a full Court of Appeal or, perhaps, more accurately, seeks a review of that judgment.

The first question which we must consider is whether the decision of a single judge exercising a power under Rule 16(1) to enlarge time can be reviewed by the full Court; the relevant provisions appear to us to be these-- first, in the Court of Appeal (Jersey) Law of 1961, the Court of Appeal has such jurisdiction as is conferred upon it by this law - that is Article 1. Article 9 provides that the Court of Appeal shall consist of an uneven number of judges

but not less than three. Article 18 Paragraph 1 provides (and I'll read):

"In any appeal pending before the Court of Appeal under this part of this law, any matter incidental thereto not involving the decision of the appeal, may be decided by a single judge of the Court and a single judge may, at any time, make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit."

Paragraph 2 of that article is in these terms:

"Every order made by a single judge of the Court of Appeal in pursuance of this article may be discharged or varied by any judges of the Court having power to hear and determine the appeal."

Article 19 of the law of 1961 provides for rules of Court to be made by the Court of Appeal; in particular, paragraph 1a provides that rules may be made for regulating and prescribing the procedure and the practice to be followed in the Court in all appeals under this part of this law and any matters incidental to or relating to any such practice or procedure, including, but without prejudice to the generality of the foregoing provision, the manner in which and the time within which any applications made under this part of this Act or any enactment are to be made to the Court shall be made.

I pause to mention that the references in Articles 18 and 19 to this part of the law are references to Part 2 which deals with appeals in civil causes and matters.

The question, therefore, is whether an order made by the Bailiff sitting as a single judge on the 1st September, 1986, was, indeed, an order made under Article 18. If it was, then, clearly, it would be open to review by reason of the provisions of Paragraph 2 of that article. The difficulty, as it appears to us, is that, at the time when the order was made, there was no appeal pending before the Court of Appeal because the appeal which had been set down in February 1986 was deemed to have been abandoned by virtue of Rule 10 of the rules. Rule 10 of the rules is in these terms:

"Subject to the provisions of Rule 16, if, at the expiration of the period of four months fixed by Rule 8(1), the appellant has not taken the steps prescribed thereby, his appeal shall be deemed to have been abandoned,"

and, as I have indicated, the steps prescribed by Rule 8(1) which are referred to in Rule 10, include the lodging of documents and contentions.

Mr Clyde-Smith, who appears for the wife on this appeal, has urged four matters upon us. First, he says - and says rightly - that Rule 10 is prefaced with the phrase, 'Subject to the provisions of Rule 16' and, accordingly, that where an order has ultimately been made under Rule 16, Rule 10 ceases to have effect. That seems to us to be correct as far as it goes but the difficulty is that, at the time when the matter came before the Bailiff on the 1st September, there was, of course, no enlargement of time and, therefore, when the Bailiff commenced the consideration of the matter before him, there was no appeal pending; indeed, the whole purpose of the application to the Bailiff was to revive an appeal which was not pending. Mr Clyde-Smith seeks to meet that point by suggesting that if leave is, in fact, granted, then it operates retrospectively so as to have the effect that the appeal had never been deemed to have been abandoned. The difficulty with that view seems to us to be that, although it might save the position where leave was, in fact, granted, it would leave the parallel problem in a case where leave had not been granted by the single judge.

The second matter which Mr Clyde-Smith urges before us is that it would be curious if an application which were made within time - that is to say, before the expiration of the four months - was an application in respect of which the decision could be reviewed under Article 18, whereas an application made, perhaps, a few weeks later but out of time, was an application in respect of which the decision could not be reviewed. We think that the answer to that contention is that, on a proper reading of the law and the rules, Rule 16 is intended to lay down a complete code for the exercise by the Court or a judge of the power to enlarge time and that where an application is made under Rule 16 of the rules, it is not, in fact, an application, ^{made} pursuant to Article 18 at all; it is an application made pursuant to rules which have been made and made properly, under Article 19(1) so that the supposed distinction between the position where the application is made before or after the expiration of the four-month period seems to us not one which can be sustained on analysis.

The third point made is that, in principle, it might be thought to be desirable that decisions of a single judge of the Court of Appeal should be subject to review by the full Court. While we accept that principle in general and, indeed, it is reflected in Article 18(2) itself, it seems to us that there may have been good reasons why the draftsman of the rules thought that that principle should not

apply in the limited cases where all that a single judge was being asked to do was to enlarge time for appeal.

There are other examples, of course, in which a decision by a single judge to grant leave to appeal or to make some other order which enables the appeal to go on, are not subject to review. If a single judge were to refuse to enlarge time, then it appears to us that Rule 16, in its terms, contains ample power for this Court, sitting as a full Court, to consider a fresh application for that purpose; the language of Rule 16 is 'the Court or a judge thereof'.

Our view that Rule 16(1) was framed in order to meet cases which would or might fall outside Article 18 and was intended to provide a complete code for such cases independent of Article 18, is reinforced by a consideration of other rules; for example, Rule 11 in the 1964 rules, which gives the Court power to direct service on a person not party to proceedings, is clearly suitable for cases ... is clearly a suitable case in which the power could be exercised by a single judge in a matter which is, of its nature, interlocutory. Now, the power under Article 11 is clearly capable of being exercised by a single judge because of Article 18, yet Rule 11 does not refer to the Court or a judge thereof, it refers only to the Court, so in a case under Rule 11, the framers of the rules clearly had in mind that it was unnecessary to refer to the power being exercisable by a single judge because that would follow automatically from Article 18 but, in a case under Rule 16, the rule-makers did not take that view. They referred expressly to the power being exercised by a single judge. The distinction between these two rules - and there are others - seems to us to indicate that Rule 16 was intended to create a special code which was to have effect independently of Article 18 of the law and that in cases where application is made for enlargement of time, the decision of the single judge to grant such an enlargement is not subject to review by this Court. As I have said, we do not seek to decide that a decision to refuse an enlargement of time would shut the prospective appellant out from his appeal; in such a case, it seems to us that the full Court would have ample power under Rule 16 itself to consider the matter 'de novo' on a fresh application.

Accordingly, we hold that we have no jurisdiction to hear the application raised by the notice of appeal dated the 10th September, 1986. The result is that the husband's appeal was revived by the Bailiff's order of the 1st September, 1986, and that that revival is not subject to our review.

