

IN THE COURT OF APPEAL

CAYMAN ISLANDS APPEAL NO. 8/71

BEFORE: The Hon. Mr. Justice Fox, J.A.  
The Hon. Mr. Justice Hercules, J.A.  
The Hon. Mr. Justice Swaby, J.A.

BETWEEN E. HEDLEY CONNOLLY ) DEFENDANTS/APPELLANTS  
G. ELLIS CONNOLLY )  
AND SELKIRK WATLER - Specific PLAINTIFF/RESPONDENT  
Performance

Mr. W.K. Chin See for the Appellants  
Mr. Norman Hill, Q.C. for Respondent

March 27, 1974

FOX, J.A.:

This is an appeal from a decision of the Honourable Mr. Justice Wilkie acting in the capacity as Judge of the Grand Court of the Cayman Islands. In his decision, Mr. Justice Wilkie decreed an order for specific performance of a contract for the sale of land in Grand Cayman. The decision was made on November 14, 1968. On that same date, counsel for the defendants gave verbal notice of appeal. Execution was stayed, and bond for the security for cost was fixed in the sum of Fifty Pounds (£50.)

Under the provisions of Section 213(1) of the Judicature (Administration of Justice) Law Chapter 74 of the Cayman Islands, the appellants were required to deposit with the Clerk of the Courts at the time on which the verbal notice of appeal was stated in open court, security in the sum of Two Pounds (£2) for the due prosecution of the appeal as well as the sum of Fifty Pounds (£50) fixed by the court as security for the cost of the appeal or in lieu of the payment of such sum of Fifty Pounds (£50) to enter into a bond in a like sum. These provisions for the deposit of the sum for security for due prosecution of the appeal and in relation to the deposit or a bond for security for costs were not complied with. Later, however, on November 26, 1968, the appellant did deposit the sum of Two Pounds (£2) with the Clerk of the Courts and did enter into a bond for security for costs.

When this appeal came before the court, Mr. Chin See on behalf of the appellants, moved the Court for the exercise of its discretion to waive the irregularities and to admit the appellants to impeach the judgment. In support of these submissions Mr. Chin See relied upon the provision of Section 211(4) of Chapter 74 aforesaid. These provisions are in all substantial respects similar to the provision of Section 266 of the Judicature (Resident Magistrates) Law, Cap. 179. Over the years these provisions have been construed by this and the former Court of Appeal. In Willlocks v. Wilson (1944) 4 J.L.R. 217. The former Court of Appeal, held that the giving of a bond for security for costs in time was a condition precedent to the jurisdiction to the Court to hear an appeal. The Court went on to point out that a condition, the performance of which founds the jurisdiction of the Court, could not be described as a formality which could be waived. In the light of this conclusion, the court held that the provisions of Section 266, which speak of 'formalities', could not apply to allow the exercise of the discretion given <sup>in</sup> those provisions to admit the appellant to impeach the judgment.

On 5th August, 1962, the Judicature (Appellate Jurisdiction) Law, 1962, Law 15 of 1962 (Jamaica) came into operation. This Law created and made provision for the jurisdiction and powers of the present Court of Appeal. Section 11 deals with appeals from Resident Magistrates' Courts. In Section 2, it ~~was provided that:-~~

"The time within which notice of appeal may be given or grounds of appeal may be filed in relation to appeals under this section may be extended at any time by the Court."

The draftsman overlooked Willlocks v. Wilson. Section 11(2) was silent as to the power of the Court to extend time for payment for security for costs. Consequently, in 1962, this Court was constrained to hold that the giving of security for costs was still a condition precedent to the founding of the jurisdiction of the court and that there was no power to treat it as a 'formality' under Section 266 of the Law. ~~Welds v. Montego Bay Ice Company Limited~~ and Smith (1962) 5 W.I.R. 56. As a consequence of the decision in Welds, Section 11 (2) was amended so as to empower the Court of Appeal to extend the time for giving security for the costs of appeal vide S. 17 Judicature (Resident Magistrates) (Miscellaneous Provisions) Act 1965, Act 13 of 1965. Be it observed, that these amending provisions apply to appeals from Resident Magistrates' Courts in Jamaica. No corresponding provisions exist which would empower the court to extend time for the payment of security for cost in an appeal from the Grand Court of the Cayman Islands, so that in relation to appeals from that Court, a failure to give security for cost in time, is fatal to the appeal, however meritorious it may be, because the error constituting as it does a failure to

comply with what has been construed to be a condition precedent to the jurisdiction of the court would not fall within the discretionary powers of this court described in section 211(4) Chapter 74, (Cayman Islands.)

In Christian v. Brown, (R.M. Civil Appeal No. 40/72, dated 2nd February, 1973,) this court held that the deposit of One Dollar (\$1.00) as security for the due prosecution of the appeal was a condition precedent to the jurisdiction of the Court of Appeal, and that the court was empowered neither by Section 11 of the Judicature (Appellate Jurisdiction Law) Law 15 of 1962, ) (our Appeal Court Law) nor by section 266 of the Judicature (Resident Magistrates) Law, Chapter 179, to exercise a discretion to admit the appellant to impeach the judgment. Christian v. Brown was affirmed by this Court in R.M. Civil Appeal No. 18/73; Patterson and Nicely v. Lynch, November 30, 1973.

In the light of these observations, it is clear that the appellants are guilty of a lapse in two respects, namely: failure to give security for the due prosecution of the appeal and to give security for the cost of the appeal within the time stipulated by the Law. **These lapses** are fatal to the appeal.

HERCULES, J.A.:

I agree with the judgment of my learned brother Fox. This is a clear case of the principle of stare decisis and in so far as the Jamaican Court of Appeal is concerned and in so far as the provisions of the Laws of the Cayman Islands go.

SWABY, J.A.:

I agree.

FOX, J.A.:

Immediately upon the delivery of these judgments, the attention of the court was directed by Mr. Chin See, after consultation, we understand, between himself and Mr. Hill, to the use of the word 'provisions' in Section 211(4) Cap. 74 (Cayman Islands) and to the distinction which may arise as a consequence of the use of that word in the Cayman Law, in place of the words 'formalities prescribed' in Section 266, Cap. 179. (Jamaica). At the same time, both counsel invited us to notice the proviso to S. 213(1) which confers a discretion upon a Judge to extend the time within which a notice of appeal may be lodged and served; as well as the amendment to S. 213(4) which it was thought necessary to enact in Law 23 of 1967 so as to make a failure to draw up and serve grounds of appeal in time specifically "subject to the provisions of subsection (4)

of section 211." But counsel agreed that in the light of the existence of these provisions, it would be legitimate to think that the effect of the provision of section 211 (4) is not as wide as the difference between its language and the language of our section 266 Cap 179 might at first seem to indicate.

The points described by counsel raise up interesting considerations. Not without hesitancy, we do not think that they affect the decision in this particular case.

Both Counsel suggested amendments to the Cayman Islands Law which could ensure a more liberal construction of the right of appeal. This, we think, is essentially a matter for the attention of the Cayman Islands Legislature. We do not describe or comment on the suggestions of counsel.

The motions for leave to file and argue supplementary grounds of appeal filed on 21st November, 1973 and on 28th November, 1973, and the motion dated 20th February, 1974 for extension of time to pay security for the due prosecution of the appeal, and to give security for the cost of the appeal are refused with costs to be agreed or taxed. Mr. Hill moves for judgment. The appeal is dismissed. The judgment of the Grand Court is affirmed.