J A M A I C A

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL No. 13 of 1972

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Edun, J.A.

BETWEEN CAY REALTY LTD. PLAINTIFF/APPELLANT

AND HADSPHALTIC INTERNATIONAL LTD.

AND

SECURICOR LTD. DEFENDANTS/RESPONDENTS

D. Muirhead, Q.C., and W.K. Chin See for plaintiff/appellant.
R.N.A. Henriques for defendants/respondents.

June 19, 20, July 6, 1973

LUCKHOO, P. (Ag.):

The appellant brought a claim against the respondents in the Grand Court of the Cayman Islands for specific performance of an agreement for the sale of real property with abatement of the purchase price of U.S. $900,000 on account of breaches of contract, in the alternative relief from forfeiture of a deposit of U.S. $89.992.80 paid by the appellant on the date of the execution of the agreement of sale. The trial judge refused to make an order for specific performance and also refused relief against forfeiture and entered judgment for the respondents. At the time judgment was pronounced attorney for the appellant gave verbal notice of appeal whereupon, after hearing attorneys for the parties, the trial judge made the following order -

/"Appellant to...

> " Appellant to enter into a bond of U.S. $910,00.00 within 14 days with one of the five major commercial banks in Georgetown as surety conditioned for the payment of any costs that may be awarded against the appellant and for the due and faithful performance of the judgment and orders of the Court of Appeal."

In making that order the learned judge of the Grand Court purported to act under the provisions of s. 213 (1) of the Judicature (Administration of Justice) Law, Cap. 74 (Revised Edition 1963 of the Laws of the Cayman Islands). That subsection as amended by s.3 of the Judicature (Administration of Justice) (Amendment) (No.2) Law, 1967 (No. 23) provides as follows -

> "(1) An appeal under s. 210 may be taken and minuted in open Court, at the time of pronouncing judgment, but, if not so taken, then a written notice of appeal shall be lodged with the Clerk of the Court, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling, or upon his solicitor or law agent, within fourteen days after the date of the judgment; and the party appealing shall at the time of taking or lodging the appeal deposit with the Clerk of the Court the sum of two pounds as security for the due prosecution of the appeal and such sum as may be deemed by the Court sufficient as security for the costs of the appeal, or enter into a bond, by himself and such sureties in such sum as the Court shall direct, conditioned for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal but there shall be no stay of proceedings on any such judgment, except upon payment into the hands of the Clerk of the Court of the whole sum, if any, found due by the judgment, and costs, if any, or unless the Court, on cause shown, sees fit to order the stay of proceedings:

/" Provided that .....

> " Provided that the Judge may grant an extension of time within which notice of appeal may be lodged and served upon due cause being shown by application in Chambers and on such terms and conditioned as he may deem to be just."

Considering the amount of the bond required to be entered into to be excessive and unreasonable and to have been fixed by the learned judge upon an erroneous view of the requirements of s.213 (1) of Cap. 74, the appellant made application to this Court by way of motion in the appeal proceedings (numbered 5 of 1972) for an order "determining the sum which is deemed to be sufficient security for the costs of the appeal or alternatively the nature and extent of the bond which the plaintiff (appellant) is required to enter in order to prosecute the appeal under s. 213 (1) of the Judicature (Administration of Justice) Law, Cap. 74 of the Revised Laws of the Cayman Islands, and for leave to enter into bond out of time." That application came on for hearing on June 15, 1972 when the learned attorney for the respondents submitted in limine that this Court had no jurisdiction to entertain the application for the reason inter alia that the appellant had neither deposited with the Clerk of Court the sum of two pounds as security for the due prosecution of the appeal nor entered into the bond as ordered by the judge in compliance with s. 213 (1) of Cap. 74. The Court in dealing with that submission had this to say about the amount of the bond into which the appellant was ordered to enter by the judge of the Grand Court -

> " As regards the sum ordered to be entered into the bond, it is our opinion that if the respondents are clearly entitled to security for the due and faithful performance of the judgment and order of the Court of Appeal, where there is no stay of proceedings on any judgment, a reasonable amount should be ordered and accepted. The amount is estimated according to the probable costs of the appeal, not the value of the property at stake:

> Morecroft v. Evans (1882) W.N. 189, but the Court does not order a sum sufficient to cover the whole of the costs of appeal, but only a reasonable amount: See per Cotton, L.J., in Aberdare and Plymouth Co. v. Hankey (1888) 32 S.J. 644."

The Court then went on to observe that it had, generally speaking, no original jurisdiction, that the appellant except for giving verbal notice of appeal had done nothing towards perfecting his appeal and that indeed in failing to comply with the provisions of s. 213 (4) of Cap. 74 (which relates to the requirement for filing of grounds of appeal within 21 days after being notified by the Clerk of the Court that the statement of the judge's reasons for his judgment had been lodged with him) his right of appeal had ceased and determined.

In the result the Court upheld the submission in limine made by attorney for the respondents and dismissed the appellant's application. Thereafter the appellant filed two summonses in the Grand Court (1) asking that the judge of that Court set a sum deemed by that Court sufficient as security for the costs of the appeal from the decision of the Grand Court in the civil suit (2) seeking an extension of time within which to file and serve a notice of appeal against the order made in respect of the amount of the bond to be entered into by the appellant. The learned judge of the Grand Court refused to make the order sought on the first summons claiming that he was without jurisdiction to do so but granted the appellant's application for leave to appeal against his order as to the amount of the bond. Thereupon the appellant filed the present appeal proceedings (numbered 13 of 1972) seeking that the judge's order in respect to the bond be set aside and that this Court fix a sum which is reasonable for the costs of the appeal, alternatively, that the amount of the bond be reduced.

Upon the present appeal coming on for hearing attorney for the respondents submitted in limine that -

/ (i) the original.....

(i) the original appeal brought against the decision of the learned judge of the Grand Court had ceased and determined because of the appellant's failure to file his grounds of appeal within the time specified in s. 213 (4) of Cap. 74 and the appellant had not sought to apply under s. 211 (4) of Cap. 74 to have this Court extend the time for performing that act;

(ii) in any event no right of appeal is conferred by s. 210 of Cap. 74 in respect of an order made under s. 213 (1) of Cap. 74, as such an order was not one made in civil proceedings within the contemplation of s. 210 and therefore the purported grant of leave to appeal against the order as to the amount of the bond is of no effect.

Learned attorney for the respondents asked that the appeal be struck out.

We are of the view that this latter submission is well founded and that the present appeal should accordingly be struck out. However, this is not conclusive of the matter. As this Court observed in the earlier proceedings No. 5 of 1972 the learned judge of the Grand Court was in error in taking into account the value of the property at stake in fixing the amount of the bond rather than in estimating the probable costs of the appeal. The Court in disposing of the application in those proceedings did not have the benefit of certain authorities which we think are of assistance in a matter of this kind. In Smith v. Williams (1922) 1 K.B. 158 an appeal was begun in the lifetime of the respondent who died before the appeal could be perfected. On a motion by the appellant that the proceedings in the appeal be continued between him and the respondent's executor and that the latter be added as a respondent it was urged on behalf of the executor that there were no proceedings in the appeal which could be continued and that even if it could be said that there were proceedings before the Court there was no statute which empowered the Court to do what the appellant asked the Court to do. It was held by Sankey, J. that the proceedings did not abate on the death of the respondent and that the Court was entitled, in the absence of

/apt procedure.....

apt procedure being provided by the statute on the subject, to mould a convenient form of procedure so that the appeal could be heard and that it would do this by ordering ... that the respondent's executor be added as respondent. Sankey, J. in so holding applied the decision in Hemming v. Williams (1871) L.R.6.C.P. 480 and in Canning v. Farren (1907) I.R. 486. After referring to the judgments delivered in those cases Sankey, J. said (p. 165) -

> " and being of the opinion already expressed that the proceedings in this matter started as soon as the notice in writing was given requiring a case to be stated I hold that I am entitled to to do what was done in Hemming v. Williams and Canning v. Farren - namely to mould a convenient form of procedure to meet the case."

In the instant matter the appeal was initiated by the appellant giving notice of appeal. Thereupon it fell to the learned judge to fix a sum to be deposited with the Clerk of the Grand Court or to order the appellant to enter into a bond in a sum to be fixed by him for the purpose stated in s. 213 (1) of Cap. 74. This step in the appeal proceedings was not carried out in accordance with the provisions of s. 213 (1) for the reasons already stated and unless and until that is duly done it does not fall for the further steps contemplated by subsections (2), (3) and (4) of s. 213 to be taken. So there can be no question of failure on the appellant's part to comply with the provisions of that subsection. In respect of the deposit of two pounds required to be made for the due prosecution of the appeal, s. 213 (1) contemplates that this will be made simultaneously with the deposit of the sum fixed or with the execution of the bond ordered by the judge. There is no procedure provided by statute to have the error of the learned judge rectified and by parity of reasoning in Smith v. Williams it is for this Court to mould a convenient form of procedure so that the appeal can be heard.

We think that in the circumstances of this case we ought to remit this matter to the Grand Court where the learned judge of the Grand Court will no doubt pay due regard to what this Court had

/to say .....

to say in the earlier proceedings in respect of his estimating and fixing the amount of the bond mentioned in s. 213 (1) of Cap. 74 and order accordingly. The other steps contemplated by s. 213 will thereafter have to be taken before the appellant's appeal can be perfected.

The order which we make is that the present appeal is struck out with costs to the respondents to be agreed or taxed and the matter is remitted to the Grand Court for that Court to fix the amount of the bond mentioned in s. 213 (1) of Cap. 74 in accordance with what that Court estimates as the probable costs of the appeal.