1950
Oct. 7
Oct. 10

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

GREATER VANCOUVER WATER DISTRICT, ... } PLAINTIFF;

AND

THE SHIP *SPARROWS POINT* and NATIONAL HARBOURS BOARD, } DEFENDANT.

Practice—Extension of time to appeal—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 82 as amended by 13 Geo. VI, c. 5, s. 2—Sufficient grounds must be shown—Solicitor's error.

Held: That a solicitor's error is not a valid and sufficient ground to warrant an extension of time to appeal. But in view of the implicit wish of the Supreme Court of Canada to have the plaintiff join in the appeal in order to give the Supreme Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff, in the event it found that the damages were caused wholly or partially by the said defendant, the motion is granted.

MOTION for extension of time to appeal.

The motion was heard before the Honourable Mr. Justice Angers at Ottawa.

Lee A. Kelley, K.C. and *Douglas McK. Brown* for the motion.

Alfred Bull, K.C. and *D. S. Montgomery* contra.

ANGERS J. now (October 10, 1950) delivered the following judgment:

This is a motion by plaintiff asking for an order extending the time within which the plaintiff, Greater Vancouver Water District, may appeal from the judgment of the Honourable Mr. Justice Sidney Smith delivered following the trial of the action on March 2, 1950, until the 15th day of October 1950.

In support of his motion plaintiff filed an affidavit by Douglas McKenzie Brown, of the firm of Russell and DuMoulin, solicitors for the plaintiff, in which it is stated in brief:

the plaintiff initially brought action against the ship *Sparrows Point;* counsel for the said ship moved before

the local Judge in Admiralty for an order joining the National Harbours Board as a defendant, or alternatively, as a third party;

by an order made in January 1949 Mr. Justice Smith directed that the National Harbours Board be made a party defendant and that plaintiff be at liberty to join issue against the said National Harbours Board;

the trial of this action was heard on February 27 and 28 and March 1 and 2, 1950, and at the conclusion thereof the trial Judge gave oral Reasons for Judgment, but indicated that he would give extended Reasons later; the said extended Reasons were handed down on March 28, 1950; the formal judgment was rendered on May 11, 1950, condemning the defendant, the ship *Sparrows Point* and other bail in an amount to be assessed and costs and dismissing the action against the National Harbours Board; the damages have not been assessed but a list of the plaintiff's damages allegedly caused by the negligence of the defendants was filed at the trial in the sum of $69,340.26.

on March 29, 1950, the ship *Sparrows Point* filed a Notice of Appeal to the Supreme Court of Canada and served the same upon Greater Vancouver Water District and National Harbours Board;

the plaintiff, Greater Vancouver Water District, in view of the fact that the defendant ship had appealed against the judgment dismissing the action against the National Harbours Board, as well as against the judgment obtained by plaintiff against the defendant ship, were advised by counsel that the Supreme Court of Canada could render whatever judgment the trial Judge had failed to render. As issue had been joined between plaintiff and both defendants the trial Judge, had he taken a different view on the question of liability, could have given judgment in favour of plaintiff against the defendant, National Harbours Board, in whole or in part;

for these reasons, the plaintiff was advised by counsel that there was no necessity for it to appeal formally the judgment of the trial Judge as against the defendant, National Harbours Board;

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during the argument of the appeal now proceeding before the Supreme Court of Canada, the Court has raised the question, without deciding it, as to whether it is necessary for the plaintiff to appeal formally in order to give the Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff in the event that it should find that the damages were caused wholly or in part by the said defendant;

if the time for appealing is extended and the appeal by Greater Vancouver Water District against the judgment is completed at this time, the National Harbours Board will be in no wise prejudiced, as all the issues and the evidence are at present before the Supreme Court.

The question of an appeal from a judgment of this Court to the Supreme Court of Canada is governed by section 82 of the Exchequer Court Act, as enacted by section 2 of chapter 5 of 13 George VI, assented to on October 27, 1949.

The material part of section 82 reads thus:

82. (1) An appeal to the Supreme Court of Canada lies

(*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and

(*b*) . . . pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

Subsection 2(*a*) is thus worded:

(2*a*) The notice of appeal shall be served and filed and the security shall be deposited within sixty days (in the calculation of which July and August shall be excluded) from the signing or entry or pronouncing of the judgment appealed from or within such further time as a judge of the Exchequer Court, or in the case of an appeal from an interlocutory judgment a judge of the Supreme Court of Canada, may either before or after the expiry of the said sixty days fix or allow.

The trend of the jurisprudence is that, when sufficient grounds are shown, the time for leave to appeal from a judgment of this Court may be extended after that prescribed by section 82.

In *Clarke* v. *The Queen* (1) it was held that the fact that a solicitor, who has received instructions to appeal, has fallen ill before carrying out such instructions affords a sufficient ground upon which an extension of delay may be allowed, after the time for leave to appeal prescribed by law has expired.

(1) (1892) 3 Ex. C.R. 1.

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In the case of *MacLean, Roger and Company* v. *The Queen* (1) it was held that, where an application was made by the Crown for an extension of time for leave to appeal long after the period prescribed in section 51 (now 82) of the Exchequer Court Act had expired, and the material read in support of the application did not show any special grounds why an extension should be granted, the application should not be allowed.

In the matter of *The Alliance Assurance Company* v. *The Queen* (2) the headnote discloses that judgment against suppliants was delivered on January 17, and the time allowed for leave to appeal by section 51 of The Exchequer Court Act expired on February 17; that on April 22 the suppliants applied for an extension of the time to appeal on the ground that before judgment the suppliants' solicitor had received instructions to appeal in the event of the judgment in the trial Court going against them; that there was no affidavit establishing this fact by the solicitor for suppliants, but that there was an affidavit made by an agent of suppliants stating that such instructions were given and that he personally did not know of the judgment being delivered until March 27.

It was held that the knowledge of the solicitor must be taken to be that of the company, that notice to him was notice to the company, and that as between suppliants and respondent the matter should be disposed of upon the basis of what he knew and did and not upon the knowledge or want of knowledge of suppliants' manager or agent. The order was accordingly refused.

In *Baker* v. *Faber* (3) an application for an extension of the time for appealing was made. The report discloses that the action was tried before a judge and a jury; that on November 21 the jury found a verdict in favour of defendant; that the judge thereupon entered judgment in his favour; that during the trial the defendant admitted that there was an obligation upon him to pay to plaintiff the sum of £904 in reduction whereof the defendant had paid to plaintiff the sum of £750; that the defendant also claimed to take credit for the balance of £154 which was paid by defendant to a third party, as the plaintiff

(1) (1894) 4 Ex. C.R. 257.
(2) (1898) 6 Ex. C.R. 126.
(3) (1908) The Weekly Notes, 9

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alleged, without his knowledge or consent, and that at the trial the plaintiff submitted to the Judge that the defendant was not entitled in law to take credit for this sum, but that the Judge overruled this contention; that on December 6 plaintiff presented at the associate's office a notice of appeal asking the Court of Appeal to enter judgment in his favour for £154 on the ground that the trial Judge was wrong in entering judgment for the defendant upon the facts admitted and proved in the course of the trial, that the plaintiff had been advised by counsel that he had three months within which to appeal; that the officials, however, declined to accept the notice of appeal on the ground that the appeal was one which came within the terms of Order XXXIX, rr. 1-a and 4, and should have been filed within eight days of the trial. Plaintiff asked for an extension of time under Order LXIV, r. 7; the Court granted the application.

In *Smith* v. *Hunt* (1) it was held by Moss, C.J.O. that upon an application to extend the time for appealing the applicant must show a bona fide intention to appeal and that no such case having been made, and the Court not being impressed with the merits of the defence, leave to extend the time was refused.

In the matter of an arbitration between *Coles* and *Ravenshear* (2) the headnote, fairly comprehensive and exact, reads as follows:

> Where, through a mistake of counsel as to the effect of Order LVIII, r. 15, an appeal was not brought until after the expiration of the time thereby allowed for appealing: *Held,* upon the authority of In re Helsby, (1894) 1 Q.B. 742, and *International Financial Society* v. *City of Moscow Gas Co.,* (1877) 7 Ch. D. 241, that there was no sufficient ground for granting special leave to appeal under the before-mentioned rule.

In a recent case before the Chancery Division of the Supreme Court of Judicature, *Gatti* v. *Shoosmith* (3), it was held by the Court (Sir Wilfrid Greene, M.R. and MacKinnon and Finlay, L.J.) that under Order LVIII, r. 15, where leave to appeal has not been served within the time prescribed by the rule owing to a mistake by a legal adviser, the Court may, in its discretion, grant leave to appeal, notwithstanding that the time for appealing has expired.

(1) (1903) 5 O.L.R. 97.
(2) (1907) 1 K.B. 1.
(3) (1939) 1 Ch. 841.

See also: The Annual Practice (1949), volume 1, p. 1456, para. 967. *Woodburn* v. *The Queen* (1); *The King* v. *Quebec North Shore Turnpike Road Trustees and Burroughs* (2).

Had it not been the implicit wish of the Supreme Court to have the plaintiff, Greater Vancouver Water District, join in the appeal in order to give the Supreme Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff, in the event it found that the damages were caused wholly or partly by the said defendant, I would have been loath to grant the extension of time sought. I do not think that a solicitor's error is a valid and sufficient ground to warrant such an extension. I may say that the Courts in England have recently shown an inclination to be more liberal in this regard. Moreover, it will likely be useful, nay advantageous, to have the standing of all parties unfolded and determined on the same occasion. In the circumstances I believe that the motion should be granted, with costs against plaintiff fixed at $20.

Judgment accordingly.