COURT OF APPEAL

22nd January, 1992

Before: **Sir Godfray Le Quesne, Q.C., (President),**
Sir Patrick Neill, Q.C.,
S. Kentridge, Esq., Q.C.

Between:	**JOHN HENRY ROE CRIDLAND (trading as Classic Trading Company)**	**Appellant**
And:	**MICHEL DECLERCQ**	**Respondent**

Appeal by the Appellant (the Defendant in the Court below) against so much of the Order of the Royal Court (Samedi Division) of 16th May, 1991, as refused the Appellant's application for an award of damages against the Respondent (the Third Party in the Court below) in respect of a breach by the Respondent of his agreement with the Appellant irrespective of whether or not the Plaintiff in the Court below pursues his claim against the Appellant.

Preliminary Point: Is the Respondent's former legal adviser the address for service within the jurisdiction?

Advocate A.P. Begg for the Appellant.

Judgment on the Preliminary Point.

THE PRESIDENT: In this case a point was raised by the Assistant Judicial Greffier on the validity of the service of the Notice of Appeal. We heard argument from Mr. Begg on this point yesterday and announced at the end of the argument that we considered the point to be good with the result that no valid service has taken place. Since the point is of some importance in the practice of the Court we now give our reasons for our decision.

The proceedings out of which the appeal arises began with an action started on the 17th October, 1989, by Order of Justice. This was an action brought by a gentleman called Overland against Mr. Cridland, who is now the appellant. Mr. Overland alleged that there had been a breach by failure to deliver of a contract for the sale by Mr. Cridland to him of a very expensive car.

Mr. Cridland's Answer was delivered on the 24th November, 1989, denying the breach. He also pleaded that if liable to Mr. Overland he was entitled to indemnity from a gentleman called Declercq, now the Respondent to this appeal, who is a dealer in classic cars in Brussels. Mr. Cridland asked for leave to convene Mr. Declercq as a Third Party and as an addition to claiming indemnity, he claimed that he was entitled to damages from Mr. Declercq irrespective of any liability under which he might be to Mr. Overland.

The Act of the Court convening Mr. Declercq was made on the 3rd May, 1990. It gave Mr. Cridland leave to serve Mr. Declercq at a stated address in Brussels.

Another Act was made on the 5th September, 1990, changing the address in Brussels at which service might be made, and at

this latter address Mr. Declercq was duly served on the 12th September.

On the 28th November, 1990, no step having been taken by Mr. Declercq, Mr. Cridland applied to the Royal Court for leave to serve on him in Brussels a summons calling upon him to show cause why judgment should not be entered for Mr. Cridland against Mr. Declercq in default of an Answer.

Leave was given to him to serve this summons, the return date being the 12th December, 1990.

When the case came before the Royal Court on that date, Advocate Labesse did appear for Mr. Declercq. The Court allowed him 21 days in which to file an Answer and ordered that if the Answer were not filed within 21 days, judgment on liability should be granted to Mr. Cridland against Mr. Declercq. A Judgment giving the Royal Court's reasons for this Order was delivered on the 20th December, 1990, and on the same day Mr. Begg, who throughout has been acting for Mr. Cridland, wrote to Advocate Labesse giving him what he styled formal notice of the Order which the Court had made for Judgment in default of the filing of an Answer.

On the 9th January, 1991, Mr. Labesse wrote two letters. The first was his answer to Mr. Begg's letter of the 9th January. He wrote to Mr. Begg:

> "Thank you for your letter of the 20th December which I received on my return to the Island. In my absence I received a fax from Messrs. Schoessetters, de Deken, and Vennoten acting for Mr. Declercq.
>
> I quote: "In view of the high costs of the law suit, Mr. Declercq decided not to defend himself in Jersey".

I have written to the Judicial Greffier to the effect that I would no longer be concerned with this matter and I enclose a copy for your records."

The second letter written by Mr. Labesse was to the Judicial Greffier, to whom he wrote as follows:

"I have now received word from some Belgian lawyers to the effect that Mr. Declercq has decided not to defend himself in Jersey. Would you be kind enough therefore to withdraw me as an Advocate interested in this matter.

I have advised Advocate Begg acting for the Defendant, Mr. Cridland, that no one in Jersey represents Mr. Declercq, the Third Party."

On the 8th April, 1991, the Royal Court gave leave to Mr. Cridland to serve ~~to~~ upon Mr. Declercq, again out of the jurisdiction, a summons to show cause why the Court, no Answer having been filed, should not give directions for the award and assessment of damages to Mr. Cridland in respect of the indemnity which Mr. Cridland claimed for anything he might be ordered to pay to Mr. Overland. And also to show cause why the Court should not give like directions in respect of Mr. Cridland's claim against Mr. Declercq for damages.

This Act, the Court ordered, should be served by personal service through the Viscount on Advocate Labesse, together with a request that it be transmitted to the Third Party. The return date stated in the summons was the 16th May, 1991. On that date nobody appeared before the Court for Mr. Declercq and the Court declared that Mr. Cridland was entitled to indemnity from Mr. Declercq against any liability to Mr. Overland. However, the Court refused to make any Order on Mr. Cridland's claim against Mr. Declercq for damages.

It should also be added that in giving Judgment announcing this decision of the Court, Commissioner Hamon said:

"The main action may, it appears, never come to Court".

Mr. Cridland then wished to appeal to this Court against the refusal of the Royal Court to make any Order on his claim for damages against Mr. Declercq. He therefore faced the problem: how was he to serve the Notice of Appeal on Mr. Declercq?

After some intervening correspondence Mr. Begg wrote to the Judicial Greffe on the 4th June, 1991, saying that he wished to apply to a Single Judge of this Court for an Order for substituted service of the Notice of Appeal.

On the 5th June, 1991, a reply was sent from the Greffe saying that the application for substituted service would not lie to a Single Judge because Article 18 of the Court of Appeal Law, which sets out the powers which may be exercised by a Single Judge, applied only in any appeal pending before the Court of Appeal.

The view hitherto taken in the Greffe, we have been told, is that there is no appeal pending before the Court of Appeal until the Notice of Appeal has been served. Therefore, according to this view, an application for leave for substituted service could be made only to the Court itself and not to a Single Judge.

This Court was not then sitting so Mr. Begg made no application for substituted service but simply caused the Notice of Appeal to be delivered by the Viscount to the offices of

Messrs. Bois Labesse. This the Viscount did on the 18th October, 1991.

The question which has been raised for our consideration by the Assistant Judicial Greffier is whether this delivery to the offices of Bois Labesse constituted good service.

The Court of Appeal (Civil) (Jersey) Rules, 1964, provide by Rule 2 paragraph (1):

> ***"An appeal to the Court shall be by way of rehearing and shall be brought by Notice of Appeal".***

Paragraph (4) of Rule 2 reads:

> ***"A Notice of Appeal shall be served on all parties to the proceedings in the Court below who are directly affected by the appeal".***

Mr. Begg conceded that Mr. Declercq, although he had been in default in the Royal Court, had nevertheless to be served because he was a party directly affected by the appeal. In our judgment he was right in making this concession. We observe by way of analogy that under the corresponding Rule in England it has been held that a party who did not enter an appearance in the Court of trial may nevertheless be a party directly affected by the appeal. (See note 59 (3) (9) in the 1991 edition of the Supreme Court Practice).

The only other reference to service in the Court of Appeal (Civil) (Jersey) Rules is in Rule 17 which reads:

> ***"Unless otherwise directed by the Court a notice or other document required to be served for the purposes of Part II of the Law or these Rules shall be served through the medium of the Viscount's Department".***

The position under the Rules therefore is that the notice of appeal had to be served on Mr. Declercq. It is clear that there has been no service on Mr. Declercq in any ordinary sense of the term.

The question which has to be answered is whether it can be said that delivery of the Notices of Appeal to the offices of Messrs. Bois Labesse in the circumstances of this case is to be treated as service upon Mr. Declercq.

Mr. Begg has submitted that it should be so treated. Mr. Labesse, he says, at one stage appeared in the Royal Court as Advocate for Mr. Declercq. He must therefore be considered to be Mr. Declercq's Advocate and so a person upon whom documents required to be served on Mr. Declercq can be served until some Order of the Court relieves him of that position.

In our judgment this submission cannot be accepted for two reasons. The first reason arises from the position of an Advocate as regards liability to receive service. Rule 6/7 paragraph (3) of the Rules of the Royal Court provides that a defendant must give an address for service in the Island when he files an Answer. There is no obligation under the Rules to provide an address for service before an Answer is filed.

In this case, as has appeared, Mr. Declercq never filed an Answer so the position in which he was obliged to provide an address for service never arose.

Rule 5/6 provides how service is to be effected when no address for service has been given. It provides that in such circumstances service must be at the "proper address" of the person to be served. And it provides various meanings of the

expression "proper address" appropriate to various cases. Paragraph (2)(a) of the Rule states that:

> ***"...the proper address of any person shall be:***
>
> ***(a) in any case the business address of the advocate or solicitor (if any) who has undertaken in writing to accept service on his behalf in the proceedings in connection with which service of the document in question is to be effected".***

Mr. Labesse never gave such an undertaking. It is, in our view, impossible to regard him, as Mr. Begg asked us to regard him, as having given such an undertaking in writing by appearing in the Royal Court on the 12th December, 1990. Mr. Labesse therefore never became a person on whom documents required to be served on Mr. Declercq could validly be served.

There is a second reason in our view why he could not in any case be treated as such a person today. This arises under Rule 15/4 of the Rules of the Royal Court. That Rule reads:

> ***"Any party may change his advocate or solicitor at any stage of the proceedings but until notice of any such change is filed and copies of the notice are served on every other party to the action not being a party in default the former advocate or solicitor shall be considered to be the advocate or solicitor of the party".***

In our judgment this rule must be interpreted as applying not only to a party who withdraws instructions from one advocate and instructs another, but also to a party who withdraws instructions from his advocate and does not instruct any other advocate or solicitor.

Mr. Labesse complied with Rule 15/4 so interpreted by his two letters of the 9th January, 1991, which we have quoted in full. Therefore, if he had ever become a person upon whom

documents required to be served on Mr. Declercq could be served, as we consider he had not, he would have ceased to be such a person on the 9th January, 1991.

It follows from this that in our judgment the Assistant Judicial Greffier was right in the point which he raised for our consideration. There has been no service of a Notice of Appeal on Mr. Declercq as required by Rule 2 of the Court of Appeal (Civil) Rules, 1964, and the appeal is therefore not properly before us at this stage.

While that would be sufficient to dispose of the question which has been argued it will clearly be useful for us to say what in our view would have been the right course for Mr. Begg to take in this case, when he wished to serve the Notice of Appeal. This depends on the proper construction of Article 18 of the Court of Appeal (Jersey) Law, 1961. Paragraph (1) of that Article reads:

> ***"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".***

It appears to us that the purpose of this paragraph is to define the powers of the Single Judge and not to provide that a given application must be made at some stages to a Single Judge but at other stages to the Court. This purpose of the enactment must be taken into account when one is placing an interpretation on the word "pending" in this paragraph. It is clear that an appeal is pending when the notice of appeal has been served. It does not follow, in our judgment, that an appeal cannot be pending before that has been done.

It is not necessary for us to attempt any exhaustive definition of the word, although it is plain that an appeal cannot be considered pending merely because a party is considering appealing, or even has formed an intention to appeal. However, if a party has drawn up his Notice of Appeal, has placed it before a Judge of the Court of Appeal, says he is in difficulty over serving it and asks the Judge to make an Order to facilitate service; in our judgment the appeal is pending within the meaning of Article 18.

We may add that if that were not so, it is hard to see how an Order for substituted service could ever be made. The jurisdiction of this Court is entirely statutory. Article 1 of the Court of Appeal Law provides:

> ***"There shall be a Court of Appeal with such jurisdiction as is conferred upon it by this Law".***

If the meaning of the statute is that no appeal can be pending before the service of notice of appeal, there seems no reason why the Court itself any more than a Single Judge should have any power to make an Order before Notice of Appeal has been served.

For these reasons we consider that on a proper interpretation of Article 18 application for an Order for substituted service can properly be made under that Article to a Single Judge.

Authorities

Royal Court Rules, 1982: Rule 15/4.
Rule 6/7(3)(4).
Rule 5/6(2)(a).

Court of Appeal (Civil) (Jersey) Rules, 1964: Rule 2(4).

Court of Appeal (Jersey) Law, 1961: Article 18(2).

R.S.C. (1991 Ed'n): 59/3/9.