

Judgment 50/2003

**Smith v Slawther
Court of Appeal
(Civil Appeal 220)
25th September, 2003**

Land – boundary dispute – appeal dismissed by Court of Appeal in 1998 – Application for leave to appeal to the Judicial Committee of the Privy Council – must be made within a reasonable time.

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 25th day of September, 2003 before Richard Charles Southwell, Q.C., Presiding, Hon Michael Jacob Beloff, Q. C., and Peter David Smith, Q. C.

KATHLEEN EDNA SMITH

Appellant

V

GORDON LAWSON SLAWTHER

Respondent

On the application of the Appellant for leave to appeal to the Judicial Committee of the Privy Council against the judgment of the Court of Appeal dated 24th July, 1998;

THE COURT, having heard the Appellant in person, and Advocate P. T. R. Ferbrache for the Respondents, thereon, GAVE JUDGMENT in the terms attached hereto, REFUSED the application and AWARDED COSTS to the Respondent on the normal recoverable basis.

K. H. TOUGH
Registrar of the Court of Appeal

OFFICIAL TRANSCRIPT

smon/SmithvSlawther25.9.03Jment
Finalised 18.11.03

THURSDAY 25TH SEPTEMBER 2003

IN THE COURT OF APPEAL OF GUERNSEY

Before

Richard Charles Southwell, Esq., QC; presiding
Hon. Michael Jacob Beloff, Esq., QC
Peter David Smith, Esq., QC

KATHLEEN EDNA SMITH v. GORDON SLAWTHER
(Civil Appeal No. 220)

Judgment delivered by the Hon. Michael Jacob Beloff, Esq., MA QC

1. This is an application by the Appellant, Kathleen Edna Smith, dated 28 May 2003 for leave to appeal to the Judicial Committee of the Privy Council against the judgment of the Court of Appeal dated 24th July 1998. It concerns a long-running boundary dispute between the Appellant and the Respondent who are neighbours, and also the Appellant's claim to a right of way over part of the Respondent's property.
2. On 29th September 1995 the position of the boundary and the scope of the right of way were determined by the Royal Court.
3. On the 24th July 1998 this Court dismissed the Appellant's appeal. In relation to the boundary, Collins J.A. reviewed the evidence in which he noted that the Jurats had the advantage of two vues de justice, and directed himself by reference to the principle: "*It is by now well established that this Court will only interfere with a decision as to fact of the Jurats if this Court is satisfied that there was no evidence before the Jurats on which they could reasonably have arrived at the findings under challenge of the appeal or that for some other reason their findings were perverse*". He concluded that "*there is no warrant for us to interfere with the decision of the Royal Court as to the location of the boundary*".
4. In relation to the right of way Collins J.A. detected a mis-direction by the Deputy Bailiff through omission of the Appellant's reference to her user of a wheelbarrow but continued: "*In order for this to affect the validity of the findings of the Jurats which followed the mis-direction this must have been a material mis-direction. For it to have constituted such a mis-direction the user ignored must have been a user which itself fell within the terms of a right of way. I have come to the conclusion that it did not so fall; this is because the nature of the right as I find it to be*". The other two members of the Court agreed.
5. Appeals to the Privy Council are either as of right or by leave granted at the discretion of the Court appealed from. [Halsbury's Laws, 4th ed, Vol II, para 407] (I need not concern myself with the third category i.e. appeals by special leave of the Privy Council).
6. Appeal lies as of right from any final judgment when the matter in dispute on the appeal amounts to or is of the value of the specified sum or when the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the like value. (Halsbury's Laws ditto, para 408, see also *Zuliani v Veira* [1994] 1 WLR 1149).

7. Even when an appeal lies as of right, application for leave to appeal must first to be made to the Court from which the appeal is to be brought: and it is the duty of that Court to form a judgment as to whether the appeal lies or does not lie under the statutory provision. (ditto, and see *Havilland Estates Limited v Channel Island Ceramics Limited*, Guernsey Civil Division – Appeal no. 164(2)).
8. The provisions governing rights of appeal from the Guernsey Court of Appeal to the Privy Council are contained in Article 16 of the Court of Appeal (Guernsey) Law, 1961. It provides, so far as material, "*No appeal shall lie from a decision of the Court of Appeal without... the leave of the Court of Appeal except when the matter in dispute is equal to, or exceeds the sum of five hundred pounds sterling.*" There is no evidence of the value of the right claimed by the Appellant. Therefore the Court's discretion is engaged. Whereas "*the grant of leave by the Court appealed from is governed by the terms of the instrument regulating appeals from that Court*" (Halsbury's Laws, ditto, para 418), there is, it appears, no express provision in Article 16 or elsewhere as to the time within which such leave should be sought.
9. I am of the view that an application for leave must, in the interests of justice, be made within a reasonable time.
10. The Applicant relies upon miscellaneous documents submitted in connection with her application. None of the copious material submitted by her disclosed any reason for the delay of five years which have passed. In her oral submissions she referred to lack of funds (and hence of legal assistance) coupled with the fact that, as this Court well knows, she is in effect fighting simultaneously on three fronts. However, while I recognise her personal difficulties, none of these factors by itself inhibited her making a timely application as a litigant in person. The Applicant candidly informed us that she had applied for legal aid which was refused because no Advocate could be found who was prepared to advise that her case had merit. Moreover, there is clear prejudice to the Respondents in re-opening the matter now when they have inevitably conducted themselves for so long a time on the basis that the case is closed.
11. Finally, I note that it is well established that the Privy Council will not entertain or allow appeals where there have been two adverse findings of fact by the Courts below.
12. I should add that even if any appeal were to be "as of right", I cannot conceive that an Appellant could exercise that right however great the time that had elapsed since the judgment from which it is sought to appeal. To countenance such a suggestion would be destructive of finality and certainty, two fundamental values of a legal system. A right to appeal frequently co-exists with a time limit on its exercise. I would hold that by necessary implication such right must be exercised within a reasonable time, although what is reasonable may be coloured by the fact that the Appellant has such a right.
13. In my view, for the reasons I have given there is no basis in this matter for any extension of time. There must and should be finality to litigation. The Appellant's continued reluctance to face the reality, namely that her claim has been carefully considered both by the Royal Court and this Court and rejected, is not in her own best interests. This application is refused.

SMITH, JA: I agree and I have nothing to add.

SOUTHWELL, JA: I also agree.

ADVOCATE PETER FERBRACHE: Sir, I make application for costs on behalf of Mr. Slawther for the appeal on the normal recoverable costs basis.

SOUTHWELL, JA: Miss Smith?

MISS SMITH: Well there has been a lot of confusion, sir, because in the first court case the Deputy Bailiff then said that the boundary is at the foot of the bank. At the vue de justice it was at the foot of the bank; but at the second vue de justice where the Deputy Bailiff was not there, it suddenly was at the top of the bank.

SOUTHWELL, JA: Miss Smith what you are now addressing is a question of whether you should pay the costs, nothing else. You are not here to re-argue the case; it has been decided against you. You are addressing us on the question of costs; is there anything you want to say in answer to the application that you pay the other party's costs?

MISS SMITH: No, I would like a meeting with the Bailiff beforehand, because the Bailiff will know there has been a mistake made, and it's for the Bailiff to sort it out; and I would ask now, you know, for me to have a meeting with the Bailiff so that we can thrash this out, because they can't own the hedge, I mean they can't own the hedge and not the land that's holding it up.

SOUTHWELL, JA: Miss Smith, costs is what you're dealing with, not meetings with anybody. If you've got anything to say about costs now is the time to say it.

MISS SMITH: Well I flatly refuse to pay him any costs because they've been dishonest all the way through, why should I pay dishonest people any money? I'm sorry but no, I flatly refuse to pay him anything.

ADVOCATE PETER FERBRACHE: Nothing to say sir.

SOUTHWELL, JA: We will order costs in favour of the Respondent in relation to this application.

ADVOCATE PETER FERBRACHE: Thank you sir.

0000000000000000

I, Suzanne Margaret O'Neill hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

..... Suzanne M. O'Neill
Tuesday 18th November 2003