BETWEEN:

BENABY REALTIES LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Montreal 1966 Aug. 9 Oct. 20 Oct. 21

(No. 2)

Practice and Procedure—Appeal to Supreme Court—Failure to file notice of appeal in time—Motion for extension of time—Discretion of judge—Exchequer Court Act, R.S.C. 1952, c. 98, s. 82.

Through the inadvertence of a junior solicitor notice of appeal from a judgment of this court was not filed with the Registrar of the Supreme Court of Canada on behalf of the Minister of National Revenue within the time prescribed by s. 82 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, i.e. by October 7th 1965. When counsel for the Minister became aware of the omission in February 1966 no action was taken nor was the solicitor for the other party informed of the omission. The latter had received notice of appeal in due time and there had been an oral understanding between counsel that this appeal would remain in abeyance pending the outcome of an appeal to the Supreme Court of Canada from this court's judgment in *Lechter v. M.N.R.* ([1965] 1 Ex. C.R. 413) which it was thought would determine the issue in this case. The Supreme Court of Canada delivered judgment in the *Lechter* case on June 28th 1966 ([1966] S.C.R. 655) but it did not determine the issue in this case. On July 14th 1966 application was made to extend the time for appeal in this case. The motion came on first on August 9th but was not heard until October 9th in order to accommodate the solicitors for the other party and it then appeared that counsel differed as to the terms of their oral understanding.

Held, but with considerable hesitation, that in all the circumstances the Minister should have the leave sought in view of the dominant fact that the other party was under the impression until this motion was

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launched that its judgment was under appeal and throughout that period the Minister intended to appeal. The difference of opinion between counsel as to the terms of their oral understanding was irrelevant in view of the *rationale* of the Supreme Court's decision in the *Lechter* case.

Gatti v. Shoosmith [1939] 3 A.E.R. 916, discussed.

APPLICATION for extension of time for appeal to the Supreme Court of Canada.

N. N. Genser, Q.C., Sydney Phillips, Q.C. and *Wolfe Friedman* for appellant.

Paul Ollivier, Q.C. for respondent.

JACKETT P. (Orally):—This is an application to me, as a judge of this Court, for an order extending the time within which an appeal may be brought from a judgment allowing this appeal in part that was delivered by my brother Noël on June 7, 1965.

The judgment so delivered is a "final" judgment within the meaning of that expression in section 82 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, which is the provision regulating such an appeal and which reads in part as follows:

> 82. (1) An appeal to the Supreme Court of Canada lies
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> (*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and
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> (*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,
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> 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.
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> (2) An appeal under this section shall be brought by serving a notice of appeal on all parties directly affected and by depositing with the Registrar of the Supreme Court of Canada the sum of fifty dollars by way of security for costs; the notice of appeal with evidence of service thereof shall be filed with the Registrar of the Supreme Court of Canada and a copy of the notice shall be filed with the Registrar of the Exchequer Court.
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> (3) 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.

With section 82, one must read section 85 of the same Act, which is as follows:

85. If the appeal is by or on behalf of the Crown no deposit is necessary.

In effect, therefore, an appeal from a final judgment by the Minister of National Revenue, which is an appeal "by or on behalf of the Crown", is "brought" by

(a) serving a notice of appeal on all parties directly affected,

(b) filing the notice of appeal with evidence of service thereof with the Registrar of the Supreme Court of Canada, and

(c) filing a copy of the notice of appeal with the Registrar of this Court,

within sixty days (in the calculation of which July and August are excluded) from the signing or entry or pronouncement of the judgment appealed from.

Whether or not the filing of a copy of the notice of appeal with the Registrar of this Court is an essential part of instituting the appeal, which must occur within the specified period, does not arise in this case. It is common ground that the filing of the notice of appeal with evidence of service thereof with the Registrar of the Supreme Court of Canada is an essential part of instituting such an appeal.

In this case, a decision to appeal was duly taken on behalf of the Minister of National Revenue in time so that

(a) a notice of appeal was served upon the solicitors for Benaby Realties Limited (hereinafter referred to as "Benaby") on June 29, 1965 and

(b) the original of such notice with admission of service endorsed thereon was filed with the Registrar of this Court on July 2, 1965.

There has been, however, no compliance with the requirement of section 82 of the *Exchequer Court Act* that the notice of appeal with evidence of service thereof be filed with the Registrar of the Supreme Court of Canada.

The failure to institute the appeal in accordance with the statutory requirement is attributed to "inadvertence", presumably on the part of the "junior solicitor" who was instructed to "file an Appeal".

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Following July 2, 1965, there was an understanding between counsel for the Minister and counsel for Benaby that the appeal in this case would remain in abeyance pending the outcome of an appeal in *Minister of National Revenue v. Ben Lechter* from a judgment, delivered by my brother Dumoulin on November 5, 1964.[1]

On or before February 23, 1966, counsel for the Minister became aware that the requirements of section 82 for the institution of an appeal from the judgment of my brother Noël had not been carried out. No action was taken at that time as a result of the realization that no appeal had in fact been instituted and no communication was made to Benaby's legal representatives of the change in the basis for the understanding between counsel to which I have referred.

On June 28, 1966, the Supreme Court of Canada delivered judgment in the *Lechter* case. While that judgment allowed the Minister's appeal in part, it was against the contention of the Minister in so far as the appeal related to the ground of appeal which gave rise to the understanding of counsel to which I have referred.

The present application was brought by notice of motion dated and served on July 14, 1966. It came on for hearing in Montreal on August 9, 1966. Following that hearing, there were written submissions and a further hearing on October 20, 1966. However, any delay in disposing of the application following the hearing on August 9, 1966 was for the purpose of accommodating Benaby and is in no way attributable to the Minister.

The situation is, therefore, that

(a) time for appeal within the period fixed by the statute expired on October 7, 1965,

(b) realization that no appeal had been instituted came some time before February 23, 1966,

(c) application for an extension of time for appeal was made on October 9, 1966 by way of a notice served on July 14, 1966.

Some help in considering this application is to be found in a passage from the judgment of Sir Wilfrid Greene, M.R. in

[1] [1965] 1 Ex. C.R. 413.

Gatti v. Shoosmith[1] quoted by the Minister in his written submission.[2] As the Master of Rolls pointed out in that case with regard to the provision that he was applying, the discretion under section 82 is "a perfectly free one". The only question to be decided is whether, upon the facts of this particular case, the discretion should be exercised. I adopt his view that there is no absolute bar to exercising that discretion in the fact that the failure to file within the statutory period was due "to a mistake on the part of a legal adviser". I must say, however, that I do not find here all the circumstances that inclined him to take a lenient view in that case. In that case there was a misunderstanding "which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen" and the period involved was "a very short one, . . . only

[1] [1939] 3 A.E.R. 916 at 919.

[2] The passage reads as follows:

> On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.
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> The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors—a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the court ought to be exercised, and, accordingly, leave will be given.

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a matter of a few days". Here, I cannot imagine that anyone who read section 82 could have been under a misunderstanding (the "inadvertence" must have been a failure to have a properly qualified person take charge of this important matter) and the period involved was four months and not a matter of a few days. The one fact that influenced Sir Wilfrid Greene in reaching his conclusion in that case that we find here is that Benaby was aware of the Minister's intention to appeal well within the time fixed by the statute for appeal.

This brings me to the painful part of my consideration of the matter. As I have already indicated, from shortly after the time that the Minister, and Benaby, thought that the Minister had instituted an appeal, there was an understanding between counsel. Unfortunately, that understanding was not put in writing at the time that it was arranged or at any subsequent time and, therein, I do not think that I am being too harsh in my opinion that both counsel concerned were grievously at fault. It is a fundamental rule of practice that all agreements between opposing sides should, if not made in writing, be confirmed in writing while the matter is fresh in the minds of all concerned. No matter how much goodwill there is on all sides, a verbal agreement between opponents leads almost inevitably to disagreement. This matter exemplifies this simple fact of life very sharply.

The Minister's position is that there was a simple understanding that the Benaby appeal "would remain in abeyance" pending the outcome of the *Lechter* appeal. His hope and full confidence was that the decision of the Supreme Court of Canada in that case would indicate quite clearly to the parties whether the point decided by my brother Noël in this case must be resolved in favour of the Minister or in favour of Benaby, in which event, the parties would settle the matter accordingly. When counsel for the Minister became aware in February, 1966, that there was, in fact, no appeal, he formed the view that this gave rise to no need for action at that time as the parties would, as he fully expected, be in a position to resolve the matter amicably when the Supreme Court of Canada pronounced its judgment in the *Lechter* case. However, when that judgment was delivered, he found that, in his view, while it was

unfavourable to the Minister on the facts of the *Lechter* case, it did not decide the question that arises in the *Benaby* case. As soon as he realized that, he took steps to launch the present application.

Counsel for Benaby, on the other hand, was of the view that the understanding between counsel was not merely that the Minister's appeal in this case "would not be pushed and that it would be held in abeyance" but that "it was further agreed to hold this case in abeyance so that the parties would follow the judgment in the *Lechter* case". His position is that "there was absolutely no question of reviewing the judgment in the *Lechter* case, because both parties agreed that the issues in the *Lechter* case and the *Benaby* case were identical and that judgment in one would be followed in the other".

The members of the profession involved in this understanding of counsel were both before me on the second hearing of this application[1] and I am happy to say that there was a sincere agreement that no lack of good faith was involved and that this unfortunate disagreement arose *bona fide* out of a difference in the basic approach to the making of the verbal agreement without any question of either party having failed in candour or sincerity.

Furthermore, it is common ground that there can be no question of my having to decide as between the parties as to what, if any, meeting of the minds there was between counsel.

To appreciate just how the parties have reached their present state of disagreement, reference should be made as briefly as possible to what was decided by the Supreme Court of Canada in the *Lechter* case and to the problem raised by the judgment from which the Minister seeks to appeal this case.

At the risk of oversimplification, the facts in the *Lechter* case may be stated as follows:

(a) in Lechter's 1954 taxation year, the Crown expropriated real property belonging to him (the effect being that the property vested in the Crown forthwith and

[1] In the future, I propose to be stricter in applying the rule that persons involved in the factual situation on which a particular proceeding has to be decided should not appear as counsel in the proceeding, unless it is, practically speaking, impossible to instruct other counsel.

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he ceased to have any title to it, his rights being replaced by operation of law by his right to compensation);

(b) in Lechter's 1955 taxation year, the department concerned reached an agreement with Lechter as to the amount of the compensation;

(c) in Lechter's 1956 taxation year, Treasury Board approval was given to the compensation agreement and the amount of the compensation was paid to him.

Lechter was assessed on the basis that the compensation was income from a business (within the meaning of that term in the *Income Tax Act*) for his 1956 taxation year. In the Supreme Court of Canada, his position was that it was taxable in the 1954 taxation year when title to the land was transferred or in the 1955 taxation year when the amount was established. The Supreme Court dealt with the matter on the basis of an agreement by counsel for the Crown that if the amount should have been assessed in a year earlier than the 1956 year when it was assessed, it was immaterial for the purposes of the appeal whether that year was 1954 or 1955. That Court directed attention, therefore, exclusively to the question whether the compensation was taxable income in the 1956 taxation year. The Minister's contention in that Court was that no taking of land and no agreement of sale was valid until approval by Treasury Board had been obtained. The Supreme Court decided against this contention and held that, if Treasury Board's authority for the settlement was required, when given, it operated as ratification of the settlement agreement that was made in the 1955 taxation year. The Supreme Court concluded, therefore, that the respondent "operating on an accrued basis, was bound to treat the profit...as having been earned" *prior* to the 1956 taxation year and that it was not therefore taxable *in* that year. The Supreme Court did not therefore have to consider whether this was a case to apply the rule that, when inventory of a trader is expropriated, the compensation has to be brought into the trader's current account in the year in which the property was taken from him and in which, therefore, it disappeared from his books as stock on hand, just as the price for which goods are sold must be brought in in the year in which the

goods are sold regardless of when the price is paid. (Compare *The Commissioners of Inland Revenue v. Newcastle Breweries, Ltd.*[1], *Ken Steeves Sales Ltd. v. Minister of National Revenue*[2] and the cases referred to therein.) In this case, as the facts appear from the judgment from which the Minister desires to appeal, the expropriation was in one year, the settlement and payment of compensation was in a later year and the compensation was assessed in the year of payment rather than in the year of expropriation. It would appear, therefore, that it was not necessary for the Supreme Court of Canada to decide in the *Lechter* case precisely the same question that is raised by the judgment in this case.

My review of what is involved in the appeal has a further relevance to my consideration of the matter in that it leads me to the conclusion that there is an important question of law involved in the appeal that was apparently regarded by the Supreme Court of Canada as being sufficiently debatable for that Court to refrain from deciding it in the *Lechter* case when it was not necessary to do so. While, as Sir Wilfrid Greene pointed out, on an application of this kind, the judge is not concerned with the merits or the probability of success or otherwise, I am of the view that it would have been an important factor to consider if it had seemed apparent that what was involved in this case were completely covered by the *Lechter* judgment.

After carefully covering the various factors that have been urged on me in the light of all the circumstances, which I have reviewed as carefully as I can, I have with considerable hesitation come to the conclusion that I should grant the leave sought. The dominant fact, as it seems to me, is that Benaby has throughout the matter, until July of this year, been under the impression that its judgment was under appeal and throughout that period the Minister has intended to appeal. While I must admit to having been inclined to the view for some time that the Minister's position was dependent on an understanding that was of dubious value, I have ended up by concluding that the difference of opinion as to the understanding is irrelevant to the question whether the Minister should be

[1] (1925) 12 T.C. 927.

[2] [1955] Ex. C.R. 108.

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allowed to file his Notice of Appeal beyond the statutory time. The same situation would have existed if the Minister's legal advisers had done their work correctly as will exist if I now extend the time for filing the Notice of Appeal and they do so within the extended time.

While I have concluded that I should grant the leave sought, I have not concluded that it should be granted without terms. I am prepared to hear the parties as to the terms on which leave should be granted and as to costs.