



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00518

BETWEEN	SWATCH AG (SWATCH SA SWATCH LIMITED)	APPELLANT
AND	APPLE INC	RESPONDENT

Kathie Williams and Katherine Pearson instructed by Livingston Alexander & Levy for the Appellant.

Stuart Stimpson and Tashawna Grannum instructed by Hart Muirhead & Fatta for the Respondent

IN CHAMBERS

Heard: 27th November, 2018, June 3, 2019

Cor: BATTIS, J.

[1] On the 27th November 2018 I dismissed a preliminary point, taken by the Respondent, and made the following orders:

1. The matter is to continue as if commenced by Fixed Date Claim.
2. Costs thrown away to the Respondent to be taxed if not agreed.
3. Notice of Appeal and Grounds filed on the 5th September 2018 will stand.
4. Parties are to agree if possible and Appellant to file the Record of Appeal on before the 18th January 2019.

5. In the event the parties are unable to agree a record of appeal the Registrar of Industrial Properties shall certify as correct the record of appeal for the court.
6. In any event the record of appeal shall be filed on or before the 25th January 2019.
7. Respondent is at liberty to file and serve an affidavit on or before the 22nd February, 2019.
8. Appellant to file affidavit in answer if so advised on or before the 22nd March 2019.
9. Notices of Intention to cross examine, if any, are to be filed and served on or before the 29th March 2019.
10. Written submissions and list of authorities are to be filed and exchanged on or before the 19 April, 2019.
11. Appeal Fixed for hearing on 25th April, 2019 for one day.
12. Formal Order to be prepared, filed and served by Appellant's attorneys.
13. Costs in the Appeal
14. Permission to appeal granted to the Respondant.

[2] On the 27th May 2019 I received written notice that an appeal had been filed since the 5th December 2018. That appeal, I assume, relates to my dismissal of the Respondent's preliminary point. These reasons will therefore focus on that.

[3] The point advanced by Respondent's counsel was that the Notice of Appeal, filed by the Appellant, did not conform with the statutory format. It was urged that the appeal should have been commenced by Fixed Date Claim rather than by Notice of Appeal.

- [4] Upon enquiry and examination it emerged that the Notice of Appeal, as filed by the Appellant, contained all the same information required by the statutory form and indeed a little more. The document clearly indicated to all relevant parties the Appellant's intent to appeal and the reasons for appealing.
- [5] Upon my enquiry of counsel for the Respondent no prejudice, caused by the use of the erroneous format could be identified.
- [6] In these circumstances I dismissed the preliminary point. It seems to me that, in the 21st century, a party ought not to be driven from the judgment seat because of a want of form. The days of the Star Chamber have long gone. It is the substance of the matter that is of import.
- [7] The Respondent asserted, "speaking notes in support of points in limine", that the appeal was a nullity consequent on the use of the wrong form. It seems to me that this is to misapprehend the true effect of the modern authorities. In this regard I will not try to improve on my statement at Paras 12, and 13 in ***Caribbean Pirates Theme Park Limited v Irish Rover Limited [2015] JMSC Civ 158***, (unreported judgment dated 29 May 2015):

"[12] However on the broader question of principle I also respectfully depart from the conclusion of my brother. This is because it is rather artificial and with respect not consonant with logic to say that a claim is a nullity and hence never existed, even after there have been documents filed in response and a court ordered injunction in existence for over a year. What of the undertaking as to damages? Can the Claimant now say since the claim never existed my undertaking never did? How about costs, on what basis does a court order costs for a claim that never existed?"

[13] An impugned law, regulation, decision of an inferior tribunal or court's process is presumed valid until and unless declared by a court to be void. If avoided it is most often treated as void ab initio. However there are circumstances and occasions when it may be voided prospectively or only for some purposes or not at all. As per Lord Phillips:

"What it all comes to is this, Subordinate legislation, executive orders and the likes are presumed to be lawful. If and when however,

they are successfully challenged and found ultra vires, generally speaking it is as if they had never had any legal effect at all. Their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders, or acts are found to have legal consequences for some at least (sometimes called “third actors”) during the period before their invalidity is recognized by the court – see for example Percy v Hall (1977) QB 924. All these issues were left open by the House in Boddington”

Mossel (Jamaica) Ltd (T/A Digicel) v OUR at paragraph 44. [2010] UK PC 1 P.C. Appeal Number 0079/2009 at paragraph 44.”

- [8] In this case the Notice of Appeal sufficed to advise of the intent to appeal, the reason for appealing and was addressed to the correct forum. That should suffice for these courts. It is well established that the forms attached to our rules of court are for guidance and do not go to jurisdiction. The point may, in any event, be argued conveniently before the tribunal hearing the appeal.
- [9] In the exercise of my discretion, this does not appear to me to be an appropriate case to declare void the Notice of Appeal which was filed. If necessary I exercise my jurisdiction pursuant to Rule 28.9 (3) of the Civil Procedure Rules make such orders as will put things right.
- [10] It is for the above stated reasons therefore that I dismissed the preliminary point and gave directions for the further conduct of the appeal.

**David Batts
Puisne Judge
3rd June, 2019**