

(3 O. W. R. 851), notwithstanding that the appeal was not brought within the 60 days prescribed by sec. 40 of the Act.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiffs.

MACLAREN, J.A.—The judgment of this Court was given on 29th June last, and dismissed defendants' appeal from the decision of the trial Judge in favour of plaintiff. Notice of appeal was given only on 16th September. In an affidavit filed on behalf of defendants the delay is accounted for: (1) by an impression that the time for appealing did not run in vacation; (2) by the absence of the solicitor who usually acted for defendants; and (3) by negotiations which finally proved to be abortive.

Section 42 of the Act says that an appeal may be allowed after the expiration of 60 days "under special circumstances," but does not indicate what such circumstances may be. In *Smith v. Hunt*, 5 O. L. R. 97, the Chief Justice of this Court, on an application in several respects not unlike the present, said: "Upon an application of this nature it lies upon the applicant to shew, among other things, a bona fide intention to appeal, held while the right of appeal existed, and a suspension of further proceedings by reason of some special circumstances."

In this case the 60 days expired on 28th August. Defendants' solicitors here only received instructions to appeal on 8th September, and it does not appear that defendants intended to appeal before the letter received that day was written at the head office in New York.

Only one of several issues, namely, the validity of a release granted by the insured to defendants, was before the Courts on the trial and appeal which have already been had. This was done at the instance of defendants, and if the result had been in their favour, it would have terminated the litigation. The result, however, having been adverse to the company, the other issues remain to be tried, if defendants do not obtain leave to proceed further.

On the whole I do not see that there is sufficient in the present case to distinguish it from the case of *Smith v. Hunt* . . . and I do not consider that justice requires that leave to appeal further on this issue should be granted. See the remarks of the Master of the Rolls in *In re Manchester Economic Building Society*, 23 Ch. D. at p. 497.

Motion dismissed with costs.