

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 23 of 1983

Between:

KENNETH JOHN HART Appellant

- and -

AIR PACIFIC LIMITED Respondent

H. Potel for the Appellant  
J. Singh for the Respondent

Date of Hearing : 16th July, 1984  
Date of Judgment : July, 1984

JUDGMENT OF THE COURT

Barker, J.A.

This is an application for leave to appeal out of time.

On the 21st December, 1982, Madhoji J. delivered a reserved decision in the Supreme Court; he gave judgment in favour of the respondent on a claim brought by the appellant for damages for alleged wrongful termination of his contract of employment with the respondent as its Repair and Overhaul Superintendent. In his judgment, Madhoji J. had preferred the evidence given by the respondent's witness to that of the appellant in crucial areas.

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Judgment was sealed by the respondent on the 30th March, 1983; in terms of Rule 16 of the Court of Appeal Rules, time for appeal then began to run. The six weeks for appealing as of right expired on the 11th May, 1983. On 26th May, 1983, costs were taxed and a consent order was made. On this day too, the appellant purported to file out of time a notice of appeal; this document was never served on the respondent.

The present application for leave to appeal out of time was not filed until 15th March, 1984. It came before Mishra, J.A., sitting alone as a Judge of this Court in terms of Section 20(a) of the Court of Appeal Act (Cap. 12). On the 22nd May, 1984, Mishra, J.A., dismissed the application. He noted in his judgment that counsel for the appellant had conceded that the delay was inordinate and that the appellant could succeed only in rare circumstances which the learned Judge found not to exist. In terms of Section 20 of the Court of Appeal Act, the appellant has exercised his right to have his application for leave to appeal considered by a full bench of this Court.

In support of his application, the appellant, who now lives in Rockhampton, Queensland, Australia, deposed that, after he had failed in his action, he gave his then solicitors instructions to appeal. They took the advice of counsel; he stated that he and his solicitors agreed that the appeal would be filed within the time allowed by the Rules. He further deposed that his solicitors told him that they were unaware as to when judgment had been sealed and that, consequently, an application for leave to appeal would be necessary. Appellant has been unemployed since leaving the employ of the respondent in January, 1982

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he has applied unsuccessfully for over 200 positions. As a professional aeronautical engineer, he claims that the adverse judgment affects his future.

An affidavit was filed from the appellant's former salicitar. He confirmed that the appellant left Fiji after he had given evidence and before the trial had finished because he was without a job and his visa had not been extended. He acknowledges that the appellant sought the solicitor's advice on whether to appeal or not. The solicitor alleged difficulty in mointaining contact with the oppellont as well as personal difficulties of his own caused by his being involved in public office and in chonging legal firms.

The principles for granting of leave to appeal out of time are the same in Fiji as in other Commonwealth jurisdictions. The Court must deal with the particular circumstances of each case. A convenient statement of principle is found in the judgment in New Zealand Court of Appeal in Avery v. No. 2 Public Service Appeal Board and Others, (1973) 2 NZLR 86 where Richmond J. (os he then was) said at p. 91 :

"When once an appellont allows the time for appealing to go by then his position suffers a rodical change. Whereas previously he was in a position to appeal os of right, he now becomes an applicont for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an oppportunity to attack the judgment from which he wishes to oppeol."

## 4.

The cases show that a mistake on the part of a legal adviser can provide sufficient cause to justify the Court in exercising its discretion to grant leave. For example, in *Gatti v. Shoosmith*, (1939) Ch. 841, there was a short delay caused by a misunderstanding on the part of the managing clerk of the appellant's solicitors which was said by the Court of Appeal to have been one which might very well have arisen. In *Lange and Others v. Town and Country Planning Appeal Board and Others*, (1967) NZLR 615, *Gatti v. Shoosmith* was followed and leave granted in circumstances where a solicitor had erroneously advised his clients as to the date by which security for costs had to be found.

In that case, the Court held that the proposed respondents had not been misled to their disadvantage by any act or omission of the appellants or their solicitors'; they had always understood an appeal was to proceed and negotiations as to the form of the case on appeal had been in progress.

On the other side of the line, leave was not granted in Avery's case itself: although there had been only a slight delay after the appeal time had expired and that delay had been caused by a mistake on the part of a solicitor, there was real prejudice to a third party in granting leave to appeal. The intended appellant had claimed that he was entitled to a position in the Public Service and that the proposed respondent had wrongly appointed another person to the post. That other person had taken up the position: he would have been considerably prejudiced if he had had to vacate it. Richmond, J. said at p. 92 :

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"Mr. O'Flynn pointed out that this was a case of a solicitor's error resulting in a short period of delay after the expiration of the ordinary time for appealing. That delay, he said, had not prejudiced anybody. No doubt there may be many cases where this type of argument might prevail upon the Court to grant leave. Clearly however the Court is not restricted to such considerations. The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved."

Mr. Patel, for the proposed appellant in this case, submitted that there would be no real prejudice to the respondent if leave were to be granted; he contrasted the situation in the present case to that where the proposed respondent was an individual who had ordered his affairs in knowledge that there would be no appeal. He submitted that there could be no such prejudice in the case of a large commercial organisation such as the respondent. He also referred to the hardship suffered by the appellant who had been out of work for more than two years and who had been making valiant attempts to find specialised employment in various parts of the world.

We do not consider that this is a proper case where justice requires that leave to appeal be granted for the following reasons :

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- (a) The delay in applying for leave, almost 18 months after the judgment was delivered, is inordinate and not properly explained, even in the context of an overseas appellant who might have had difficulty in communicating with his solicitors.
- (b) The case is not one where there has been some mistake as to time limits or the like of a relatively minor kind which would justify leave as in, for example, *Gatti v. Shoosmith*; the solicitor here knew what the time limit was; his mistake appears to have been a serious one. The corollary of this statement is that the appellant may well now receive advice that he has another remedy which he can pursue: in the circumstances, that is not something on which we can adjudicate at present.
- (c) The reasons advanced by the appellant are not sufficiently cogent to outweigh the above two factors; whilst it is true that the position of the respondent cannot necessarily be equated with that of an individual, the respondent is nevertheless entitled to have ordered its affairs on the basis that there would be no appeal.
- (d) Looking at the whole of the picture, as suggested in the Avery case, there is no indication of any sense of urgency exhibited by the appellant. Judgment was

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sealed, not by the appellant but by the respondent with the result that an appeal could have been lodged in time within almost 5 months from the date of judgment. There was then an abortive attempt to file an appeal in May 1983; for reasons unexplained to us, this move was not immediately followed by an application for leave to appeal out of time. Had application been filed in May or June 1983, there might have more prospect of a successful application.

- (e) We agree with Mishra, J.A., that it is not uncommon for litigants in Fiji Courts to be resident outside the country but that with the present state of international communications, absence from Fiji can seldom if ever be advanced as a valid ground.
  
- (f) Although the merits of cases and the likelihood of a successful appeal was said at p. 846 in Gatti v. Shoosmith not to be a matter of concern on an application of this sort, we do observe that the proposed appeal would be against findings of fact and the judge's disbelief of the appellant. The case can be distinguished from those where there is a point of law in issue: for example, Thompson v. Turbott, (1963) NZLR 71 where it was alleged that the question for decision on the proposed appeal was one of public importance. In that case, leave to appeal out of time was refused

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by the New Zealand Court of Appeal because the appellant had made a deliberate decision not to appeal from which he subsequently resiled.

For all the reasons stated, the present application must be dismissed with costs.

*G. Leigh*

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Vice President

*Greg O'Keefe*

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Judge of Appeal

*R. D. Barker*

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Judge of Appeal