IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0051 OF 1994S
(Civil Action No. 178/89 - Suva)

Between:

IST DEO MAHARAJ
s/o Sukh Deo Maharaj

Appellant

- and -

BURNS PHILIP (SOUTH SEA)
COMPANY LIMITED

Respondent

Ms V. Narayan for the Appellant
Mr. G. Prasad for the Respondent

Date of Hearing: 19th October, 1995
Date of Decision: 8th November, 1995

DECISION

(Chamber application for leave
to appeal out of time)

This is an application by the Appellant under the Court of Appeal Rules for leave to appeal out of time from a judgment of Fatiaki J when on 3 June 1994 he heard and dismissed the Appellant's (original Plaintiff's) claim.

The application by way of Motion was filed on 6 September 1995 which is some 15 months after the delivery of judgment. In the Affidavit in Support of Motion the Appellant states that the failure to file Grounds of Appeal was *"due to a misunderstanding which developed between my solicitors and my agent, Mr. Arvin Maharaj, regarding the appointment of Mr. S. J. Stanton of Australia to prepare the Appeal for us"*. It further stated that it was only after the Appellant discovered that the Appeal had not been filed that the present solicitors were instructed to *"file an Appeal"*.

That is the gist of the reason for not filing Appeal in time.

The Court is required to determine whether a delay of about 14 months in applying for leave to appeal out of time is justified in the circumstances of this case or not.

Upon a careful consideration of the Appellant's said affidavit, I am not satisfied with the reason given in support of the application. There is nothing in the affidavit to show what steps the Appellant himself took in ascertaining what was happening to his instructions to appeal after judgment was delivered on 3 June 1994. He does not say as to when he instructed his former solicitors Messrs Patel Sharma & Associates to *"prepare a Petition and Grounds of Appeal"*. There is no Affidavit from the said solicitors to say what the actual *"misunderstanding"* was, if any; nor has the Appellant's agent Arvin Maharaj filed an Affidavit to show what the actual problem was that was being encountered. The Affidavit is devoid of any dates as to when the *"misunderstanding"* arose and what steps, if any, were taken to solve the problem.

The material that is before the Court is unsatisfactory to explain why there has been a delay in seeking to appeal. The reason given, in my view is no good reason upon which the Court could exercise its discretion.

It is stated in the judgment of the Privy Council in RATNAM v CUMARASAMY 1964 3 AER 933 at 935 that:

> *"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation"* (underlining mine for emphasis)

As stated above, no such material can be found in this case. In JASWANT SINGH s/o Gopal Singh and PETER FRANCIS s/o Francis Appana (Action No. 57/73 F.C.A cyclostyled judgment) as here the facts were held to be unsatisfactory; the situation there was that due to oversight in instructing solicitors due to Appellant's commitment in Australia, the application was refused where the delay was four weeks. Further in that case MARSACK JA said that he *"can find no grounds for holding that good reasons for the delay have been shown"* even when the Appellant's solicitor was engaged in a Supreme Court criminal trial at the relevant time for filing appeal, he did not think that *"the granting of an extension of time is required in the interests of justice"*.

In TEVITA FA t/a Tevita Fa & Associates AND TRADEWINDS MARINE LTD and OCEANIC DEVELOPERS (FIJI) LTD (Civ App. No. 40/94 FCA) THOMPSON J.A. on a similar application said:

"The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr. Patel has asked me to draw from his statement of present belief that time began to run only from 8 August 1994."

Dealing with the subject of delay LORD DENNING M.R. expressed his view clearly in REVICI v PRENTICE HALL INCORPORATED & OTHERS (1969 Q.B. D. p. 157 at p.159) as follows:

"Nowadays we regard time very differently from the way they did in the 19th century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had three and a half months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more."

If the delay is a short one leave could be considered favourably *"especially if the reasons for the delay are satisfactorily explained"* (Sir Moti Tikaram J.A. (now President) in BASANT KUAR t/a Thakur Singh and HOUSING AUTHORITY (Civ App 21/91 FCA). There although the delay was not a long one, explanation for the delay was not satisfactory and the application was refused.

The Court has an unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the respondent if the application is granted (vide CM VAN STILLEVOLDT BV v EL CARRIERS INC (1983) 1 WLR 207 at 212; NORWICH AND PETERBOROUGH BUILDING SOCIETY v STEED (1991) 2 AER 880 C.A.).

M/s Narayan has argued that the Appellant should not be penalized for the failure of the solicitors to arrange for overseas counsel in time. She relies on GATTI v SHOOSMITH (1939 3 AER 916 CA) where the matter is fully considered. In his judgment, LORD GREENE, M.R. at p.919, stated as follows the principles to be taken into consideration by the Court in deciding how judicial discretion should be exercised:

> *"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.*
>
> *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."* (underlining mine for emphasis)

Later in his judgment, in which MacKinnon and Finlay, L.JJ. concurred, the Master of the Rolls said -

> *"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."*

So in a suitable case the mistake of a legal adviser *"may be"* (GATTI supra) a ground for the exercise of the Court's discretion. In GATTI there was a delay of a few days owing to a misunderstanding of the rule relating to the time given for lodging an appeal. On the facts of that case where the circumstances were far different from that which apply here, leave was given. In the case before me it can barely be said that a period of few days is involved. Although an appeal was in contemplation, no concrete steps were taken towards it for over a year.

In another case LATCHMI AND ANOTHER v MOTI AND OTHERS (10 FLR 1964 FCA p.138) where the delay was six months the ground of application being that it is the appellants' solicitors and not the appellants who are to blame for the delay, it was held (as per BRIGGS and MARSACK JJ.A, MILLS-OWENS P dissenting) that the application should be refused as no ground has been put forward upon which justice required that leave to appeal out of time should be given. MARSACK J.A. also pointed out that:

> *"In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the Respondent are considered equally with those of the Appellant."*

Even in NELSON TOBACCO COMPANY PTY LTD v COMMISSIONER FOR ACT REVENUE (No. 2)(109 FLR p.323) MILES CJ refused leave where the delay was considerable and the only explanation given for the delay was that the plaintiff's solicitors sought advice from counsel.

I agree with McHUGH J in GALLO v DAWSON (1990) 64 ALJR 458 at 459 where he said:

> *"A case would need to be exceptional before a court would enlarge by many months the time for lodging an appeal simply because the applicant had refrained from appealing until he or she had researched the issues involved. In Hughes v National Trustees Executors & Agency Co of Australasia Ltd [1978] VR 257, McInerney J pointed out (at 263) that one object of fixing times under court rules is "to achieve a timetable for the conduct of litigation in order to achieve finality of judicial determinations." When the time for appealing has expired, the litigation is at an end; the successful party is entitled to the benefit of the judgment in his or her favour. At that stage, the successful party has a "vested right to retain the judgment". It would make a mockery of O 70, r 3 if, months after the time for appealing has expired, the unsuccessful party could obtain an extension of time on the ground that he or she had delayed appealing because that person wanted to research the issues involved. Lack of legal knowledge is a misfortune, not a privilege."*

I see no real difference in the nature of reasons in the above cases to the reason given in the case on hand, that is, not taking steps to ascertain in time whether the appeal had been lodged or not.

Of the four factors which are normally taken into account referred to above I find that the length of delay is far too long and the reason for delay is unacceptable. The Court looks at each case on its own facts; here the appellant instructed his solicitors to appeal and did nothing thereafter on his part for over a year to ascertain how the appeal is progressing. It would open the floodgate if I were to grant leave for the reason given in this case and the length of time that has elapsed bearing in mind the factors normally taken into account in an application of this nature.

As for the third factor, namely, the chances of the appeal succeeding if time for appealing is extended, the Court does not have to go into the merits of the appeal. [LATCHMI (supra)].

The Appellant has in his Affidavit stated that he has a good and valid grounds of appeal. The Respondent on the other hand states in paragraph 13 of the affidavit of Hari Narain in Reply as follows:-

i) That there is no serious issue of fact or law to be appealed against in this case. In fact, the Honourable Judge made certain findings of facts on the demeanour of witnesses and unless there are special circumstances, this Honourable Court will uphold these findings.

ii) That the amount involved in the Appellant's claim is only $20,500.00, a sum which is not significant in the circumstances of this case.

iii) That the Appellant has had more than ample time to sort out the matter of his appeal and he cannot now pass on his difficulties and "misunderstandings" with his own solicitors and/or Counsel to the Respondent.

In so far as I am required to look at the grounds of appeal for the purposes of this application, as was done by THOMPSON J.A. in TEVITA FA (supra), I find there is great deal of merit in the Respondent's contention in paragraph 13(i) hereabove. The findings of FATIAKI J in this case have been well summed up in the following paragraphs of his judgment (pages 17 and 18 of cyclostyled judgment) which I have read, which go to show that the Appellant does not, in my view, have any reasonable prospect of success if he proceeds with his appeal:

"I also find that the defendant company's responsibility for the sea leg of the journey was purely that of an "arranger" and as such it is not liable for the failings of the carrier of the plaintiff's vehicle with whom it contracted on behalf of the plaintiff as the "consignee" and "shipper" of the car (See " Exs 3 and 4).

In all the circumstances I am not satisfied that the defendant company did contract to insure the plaintiff company's vehicle on the sea-leg of its journey from Suva to Sydney or that it was in any breach in its performance of the contract entered into with the plaintiff's son nor has it been established to my satisfaction that the defendant company was independently in breach of any relevant 'duty of care' in that regard.

Undoubtedly the manner and place in which the plaintiff's vehicle was stowed on board the 'Fua Kavenga' left much to be desired but that was something over which the defendant company neither contracted with the plaintiff to undertake or supervise nor in my view could it reasonably have insisted on a particular form of stowage in the carrier's vessel when that function was the sole responsibility of the sea carrier."

As for the fourth factor, namely the degree of prejudice to the Respondent if the application is granted, the Appellant states that it is insignificant in that the *"Respondent has not done anything in reliance on the judgment which cannot be corrected or changed"*.

On the other hand the Respondent says, inter alia, that it has *"removed this claim from its books as a contingent liability"* since a long time has elapsed since judgment.

I am of the view that although it does not appear that the Respondent will be greatly prejudiced in all the circumstances of this case, there is some prejudice which I have weighed in the balance along with the other three factors which are all intertwined; and, as the three factors referred to above are so overwhelmingly against the Appellant, I cannot see how even in the interests of justice I can grant leave to appeal out of time. On this aspect I refer to the following passages from the judgment RICHMOND J in AVERY v PUBLIC SERVICE APPEAL BOARD (No.2) (1973) 2 NZLR 86 at 91 which is apt (which was approved by the full court of Fiji Court of Appeal in KENNETH JOHN HART

v AIR PACIFIC LTD (Civ. App. No. 23/83) in refusing leave to appeal out of time:

> *"When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant 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 opportunity to attack the judgment from which he wishes to appeal."*

Further in his judgment at p.92 RICHMOND J said:

> *"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."*

In the outcome, having considered the affidavits filed and the submissions made by both counsel and bearing in mind the factors that ought to be taken into account in applications of this nature, I find that substantial delay has occurred and no satisfactory reason has been proffered to enable the Court to exercise its discretion to grant leave out of time to the appellant.

The application is for these reasons refused with costs to the Respondent which is to be taxed unless agreed.

Justice D. Pathik
Judge of Appeal

8 November 1995