IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0019 OF 1995S
(High Court Judicial Review No.20 of 1994S)

BETWEEN:

HARIKISUN LIMITED	APPELLANT
-and-	
DIP SINGH AND OTHERS	1ST RESPONDENTS
-and-	
THE DIRECTOR OF TOWN & COUNTRY PLANNING	2ND RESPONDENT
-and-	
SUVA CITY COUNCIL	3RD RESPONDENT

Mr. H. Nagin for the Appellant
Mr. P. Sharma for the 1st Respondent
Mr. D. Singh for the 2nd Respondent
Mr. R. Gopal for the 3rd Respondent

Date and Place of Hearing : 28 May 1996, Suva
Date of Delivery of Judgment : 4 October, 1996

JUDGMENT OF THE COURT

On the 28th February 1995 Byrne J. gave the first respondents leave, pursuant to Order 53 rule 3 of the High Court Rules 1988, to apply for judicial review of certain decisions made by the second respondent and the third respondent on or about the 20th December 1993. The appellant has appealed against that decision.

It is not necessary to set out in this judgment all the matters raised before Byrne J. but it is necessary to outline

briefly the factual position out of which this matter arose. The first respondents (the Singhs) are four brothers who own a property at 70 High Street, Toorak, on which there is a dwelling house. Three of the brothers live in the United States of America but the fourth lives in the house at 70 High Street. The land is zoned residential. Adjoining this land is a property owned by the appellant (Harikisun) which is zoned commercial. On or about the 20th December 1993 the second respondent, the Director of Town and Country Planning, (the Director), purported to relax the requirements of Provision 24 of the City of Suva Town Planning Scheme General which would allow the third respondent, Suva City Council, (Suva City), to approve a commercial building from the boundary line of Harikisun's land instead of 1.5 metres from the boundary as required by the Town Planning Scheme General. On the 20th December 1993 or sometime thereafter Suva City purported to relax the requirements of the Town Planning Scheme General in accordance with the Director's decision.

The Singhs, by notice of motion dated the 16th August, sought the leave of the High Court pursuant to Order 53 to apply for judicial review of the decisions of the Director and Suva City. The relief to be sought was an Order of Certiorari to quash the decisions, Declarations and an Order for an Injunction and damages. It is not necessary to discuss the nature of the relief sought other than to observe, as will become apparent later, that the Rules under Order 53 have some difference in application if certiorari is sought as opposed to any other

relief. It should be added that damages were sought here, presumably in terms of the powers given under rule 7, but the basis or nature of such claim, and against whom it was made, was not given nor, in result, were the requirements of rule 7(12) capable of being met. This application for leave was opposed by Harikisun, the Director and Suva City. After hearing the parties, and with consent of all, inspecting the two properties Byrne J., as noted earlier, gave the Singhs leave to apply for judicial review of the two decisions. In the course of his judgment the learned judge dealt with the various grounds raised by Harikisun, the Director and Suva City, as to why leave should be refused. On the appeal it became clear that the only ground that they now rely upon is that of delay on the part of the Singhs in making the application for leave.

It is now necessary to refer to the terms of O.53 r.3 which provides that no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with the rule. The rule does not lay down any criteria upon which the Court must proceed, so on the face of the rule the discretion of the Court is unfettered. That does not mean, of course, that the Court's discretion is wholly subjective. Clearly it must act in accordance with judicial principles and is subject on appeal to review if it fails to observe them. The text books on administrative law contain many examples of such failures. We do not intend to make a catalogue of the matters that must be considered by a Court in considering such applications but obviously delay on the part of the applicant in

applying will be an important one. That it is so is reinforced by the express terms of r.4 which applies when delay is involved and is being considered by the Court. The terms of the rule are as follows:-

> *"4.-(1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant-*
> *(a) leave for the making of the application, or*
>
> *(b) any relief sought on the application, if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*
>
> *(2) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.*
>
> *(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."*

The first matter to be noted is that this rule is not in its language limited to applications for leave to apply for judicial review. In our view it applies to both applications for leave and to the substantive hearing of the motion for review. We accept on this aspect of the matter, however, the submission of

Mr Nagin that the wording of para (1) makes it clear that sub-paragraph (a) applies only to applications for leave and sub-paragraph (b) to the substantive applications for review. The wording it will be observed is:

> *"..... the Court may refuse to grant-*
> *(a) leave for the making of the application, or*
>
> *(b) any relief sought on the application, if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."*

The first sub-paragraph (a) plainly refers to the leave application only. Once leave has been granted what is before the Court is the substantive application for review and so no question of refusing to grant leave could arise. On the other hand sub-paragraph (b) can only apply to tbe substantive review application because the Court cannot grant or refuse any relief sought in judicial review at the application for leave stage. In our view the words following sub-paragraph (b) "if in the opinion of the Court, the granting of the relief sought would be likely to cause etc" apply to sub-paragraph (b) only. This again follows from the wording. It is only on the hearing of the substantive application for review that the Court can grant the relief sought; it certainly cannot do so at the application for leave stage. Thus the questions of substantial hardship, prejudice to rights and detriment to good administration, which depend upon "the granting of the relief sought", are matters for the Court on the substantive review application, not on the

application for leave which is concerned with delay, and the reasons for it, in bringing the action. THere are other differences in the discretion exercised by the Court at the leave stage as compared with the substantive hearing stage. See Lord Diplock in Inland Revenues Commissions v. National Federation and Self Employed and Small Businesses Ltd. (1982) AC 617 at 644.

It follows in our view that for leave a Court on the hearing of an application should consider the question of delay in terms of rule 3 and rule 4(1). Thus where the Court considers there has been undue delay it may refuse to grant leave; or where the application is made after "the relevant period", that is, in the case of applications for certiorari, three months after the date of the proceeding, it may refuse to grant leave. It may do so, not shall do so. What, then, was the factual position so far as delay was concerned in this case and was the application made after the relevant period?

There was a good deal of affidavit evidence, and much argument, as to when the Singhs first knew of the decision of the Director and Suva City. Mr Nagin contended they knew from the 9th February 1994. The learned judge held that though there was some correspondence between the Singhs and Suva City they did not know of the actual decision until 3 March. It was generally accepted by counsel that so far as the relevant period, that is the three months under r.4(2), was concerned, it ran from the date of the actual decisions, which were 20 December 1993. We think this is correct. It follows that the three month period

ran from the 20th December and thus the application for leave, which was filed on the 16th August was, so far as it relates to the certiorari relief claimed, after the relevant time had expired, which was on the 20th March.

The learned judge expressed the view that since it was not until the 3rd March that the Singhs knew of the decision, the three month period did not begin to run until then. We think he is wrong as to that but we share his clear view that culpability for delay should not be attributable to the Singhs before that date. It is clear that the application was filed after the relevant time of three months had expired, even from that later date, but that in itself does not require leave to be refused. It is a ground on which the judge may exercise his discretion and refuse leave but he was not obliged to do so. We turn, therefore, to consider whether the delay was undue in terms of the rule which requires one to consider whether the reasons for it were such as to make it reasonable and justifiable.

Mr Sharma for the Singhs, said to us, in what might be described as a clear and forthright submission, that the only reasons for the delay were those canvassed by the judge, namely, that the brother who lived in Suva went to the U.S.A later in March to discuss the question of what should be done with his brothers who lived there; then before he could take any action he had to wait until he had received formal Powers of Attorney from each of them, the last of these was received in late July. The learned judge considered submissions from Harikisun, the Director

and Suva City, that this reason did not justify the delay. On his calculations as to time, proceeding on the basis that the three month period did not begin to run until the 3rd March, the time after the three month period expired was only two and half months and not the five months contended for by the other parties. He said he was not persuaded that those two and a half additional months over the three month period had caused substantial hardship or prejudice to the rights of the other parties or was detrimental to good administration. He obviously had the latter part of r.4(1) in mind, which we have held was not expressly applicable, when he expressed this view but, in our view, the effect of the delay upon others is clearly a factor to take into account when considering whether delay is undue in terms of the rule. "Undue" means excessive, extreme, unjustifiable or going beyond what is appropriate. The effect upon others may well bear upon what these terms import. The learned judge went on to say that the brother living in Fiji could not be criticised for getting the consent of the other three brothers by Powers of Attorney; that it was possible that he could have consulted them on the matter by ordinary mail or telecommunications instead of going to the United States of America but these questions are always relative and he was not prepared to hold on the material before him that the Singhs had not behaved sensibly and reasonably. While the learned judge's view is not shared by all the members of this Court we cannot say he is wrong. As was said by the Supreme Court of Fiji in Merit Timber Products Ltd v Native Land Trust Board (Civil Appeal No. CBV0008/94: 24 November 1995) at page 11 of the judgment:

"We are also mindful of the rule that an appellate court should not substitute its own view for that of the primary judge where a "discretionary" judgment is under review, in particular where elements of value judgment are involved. It would be wrong to substitute our view simply because we regard the balance as tipped against the way in which the primary judge decided the matter."

We also share the view of the learned judge, expressed in his citation from the leading case of Caswell v Dairy Produce Quota Tribunal for England and Wales (1990) 2 A.C 738 (1990) 2 All E.R 434, which emphasised that questions of delay are best dealt with in depth at the substantive hearing and that leave should only be refused in clear cases of unjustifiable delay.

We have just referred to the judgment of the House of Lords in the leading English case in relation to delay in applications for judicial review, but we have not attempted to apply the English approach to our rules in Fiji as the English rules are very different to ours. The English provisions are contained in 0.53 r.3 and 4 and in s.31(b) of the Supreme Court Act 1981. In result there are two separate and different tests created which differ in their requirements and the Courts have had the task of endeavouring to reconcile them. Lord Goff in Caswell's case, supra, refers to and discusses, several of these differences. Our 0.53 r.4 has combined the two tests in one and in our view does not contain the problem of reconciliation that the English rules have though it cannot be said that the rule is very happily worded. In our view it is not. In result the English authorities do not assist greatly in determining the meaning of

our provisions, the meaning and construction of which we have approached, as we have already noted, without attempting to apply the reasoning of the English Courts which was necessary partly to reconcile their conflicting provisions. In addition, as already pointed out, the provisions are very different. The English rules start by stating that no application for judicial review shall be made unless leave of the Court, granted in accordance with the rule has been given. The application is made ex parte and not on notice, as our rule requires. The next rule, r.4 then provides that any such application shall be made promptly and in any event within three months from the date when the grounds for the application first arose unless the Court considers there is good reason for extending the period for making the application. Thus it follows there is a finite period within which the application must be made, and if it is not made in that period, there must be an extension of time sought on the ground that there is good reason to grant the extension; and in any event it must be made promptly within that period. This is by no means the same approach as our r.4 and the term "undue delay". Further the fixed period in our rule applies only to certiorari, not to all applications, as does the English rule. In substance it may be said the English rules give a fixed time to apply, and if the application is not made within that time the applicant has a duty to show good reason why time should be extended. Here in Fiji the Court has a general discretion in terms of which the applicant has an obligation to show there has not been undue delay in the matter. No question of extending times that are otherwise finite arises. What is meant by undue

delay will, in our view, vary according to the circumstances of each case. It may be noted that the English provision contained in s.31(6) of the Supreme Court Act 1981 also refers to "undue delay", as opposed to "promptly" in the rules, which in our view adds to the difficulty of trying to apply the English cases to our provisions.

For the reasons expressed earlier in this judgment the appeal fails and is dismissed. The first respondent is entitled to costs.

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Sir Mari Kapi
Judge of Appeal

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Mr Justice Savage
Judge of Appeal

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Mr Justice Hillyer
Judge of Appeal

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