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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0049 OF 1997 — IN CHAMBERS

BETWEEN:

THE OFFICIAL RECEIVER
as trustee in Bankruptcy of Estate of Abdul Karim

APPELLANT

-and-

PETRIE LIMITED

RESPONDENT

Dr Sahu Khan for the Appellant
Mr. R. Krishna for the Respondent

Date and Place of Hearing : 25 November 1997, Suva
Date of Delivery of Decision : 28 November 1997

DECISION

By his summons filed in this matter on 27 August 1997, the appellant, who was the plaintiff in the High Court, seeks an order that he be granted leave to file a notice of appeal out of time. There is also an application for an order that the execution of a judgment for possession of land recovered by the respondent (the defendant below) in a counter-claim be stayed pending the determination of the appeal. Although, nominally, the appellant is the Official Receiver as trustee in bankruptcy of the estate of Abdul Karim, it is Mr. Karim who has had the carriage of the matter. No doubt the Official Receiver's consent was obtained to this course. There is no evidence of this. The matter

was not mentioned by either party in their written submissions or otherwise and I shall not refer to it further.

The dispute between the parties concerns the right to possession of land which is claimed by the appellant to be subject to the provisions of the Agricultural Landlord and Tenant Act Cap.270, Ed 1978 ("the Act"). A number of the provisions of that Act deal with the rights of tenants of agricultural land. Although those provisions were in question at the trial of the action, the principal question which seems to have occupied the attention of the Court at first instance was whether or not the appellant was entitled to the freehold title to the land pursuant to an oral contract of sale which was said to have been partly performed. On that issue he failed. Although there are grounds stated in the proposed notice of appeal which would enable the question whether the appellant was entitled to the freehold of the property to be raised in the Court of Appeal, the principal grounds appear to relate to the question whether or not the respondent was entitled to bring to an end the tenancy which, in the alternative, the appellant claims to have. His claim was that the original contract of tenancy which he had was extended by the operation of the Act until 2004.

The respondent's case was, and is, that the appellant has no title, whether freehold or leasehold. He is, in the respondent's submission, nothing but a trespasser. That was the way the learned primary Judge (Lyons J) looked at the matter. He dismissed the appellant's claim, upheld the counter-claim for possession of the land brought by the respondent and ordered the appellant to vacate the premises.

If the appeal had been filed within time, the appellant would have had an appeal as of right and would not have needed leave. But the appellant is well out of time. The reasons for this will be mentioned in a moment, but because he is out of time he requires the leave of the Court pursuant to the provisions of s.20(b) of the Court of Appeal Act Cap.12 Ed 1978 which provides that a single judge of the Court of Appeal may extend the time within which a notice of appeal or an application for leave to appeal "may be given". So far as relevant Rule 16 of the Court of Appeal Rules Cap.12, Rev. 1985 provides that subject to the provisions of the rule, every notice of appeal shall be filed and served under rule 15(4) within the period of 6 weeks from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected.

The practice of the Court is to regard the order as perfected when it has been sealed. The orders in the present case were sealed on 22 April 1997. The judgment had been delivered on 18 April 1997. It follows that the time for appealing was 6 weeks from 22 April 1997. As mentioned, the Summons in this matter was filed on 27 August 1997, a little over 4 months after the order was sealed and a little over 12 weeks after the time for filing the appeal expired on 3 June 1997.

There is evidence called on behalf of the appellant to explain the delay. I shall refer to this in a moment but, before I do so, I find it helpful to refer to the recent judgment of the learned President of this Court in Sundar and Anor v Prasad (No. ABU0022 of 1997, 10 November 1997). His Lordship said (at p.6) that the factors that were normally taken into account when dealing with an application for leave to appeal

out of time were the length of the delay, the reasons for the delay, the degree of prejudice to the respondent if the application were granted, and the prospect of the intended appeal succeeding if the application were granted. The discretion conferred upon the Court by s.20 of the Court of Appeal Act is of course unfettered. It is at large. But, in my respectful opinion, the matters referred to by His Lordship provide helpful guidance to judges exercising discretion under the rule. Every case must depend upon its own facts and circumstances but there are certain matters which ought to be considered in most cases. Those matters are comprehended in His Lordship's list.

The evidence concerning the reasons for delay called in the appellant's case may be summarised as follows:-

1. The appellant is a poor man and originally did not have the resources to lodge an appeal. This of course was a reference to Mr. Karim and not to the Official Receiver.
2. Neither Mr. Karim nor his solicitor took any steps to seal the order until June 1997.
3. Until then both the appellant and his solicitor were unaware that the order had been sealed at the request of the respondent's solicitor. No copy of the sealed order had been served upon Mr. Karim or his solicitor.
4. Originally the appellant's solicitor was under the impression that the appropriate procedure for applying for the extension of time was by application to the High Court. Such an application was made on 30 June 1997. At that stage 27 days had

elapsed since the period for lodging an appeal of right had expired. Before the application was made, the appellant's solicitor went to the Registry to seal the order. It was then that he discovered that the order had already been sealed at the request of the respondent. The application to the High Court was misconceived. It had no jurisdiction to grant the order which was sought. The matter was listed before a judge of the High Court on three occasions, the last on 15 August 1997. There is disagreement between the solicitors for the parties as to whether the High Court's lack of jurisdiction was brought to the attention of the appellant's solicitor before 15 August. There has been no cross-examination and I have not been referred to the record of the proceedings in the High Court. I would not have regarded it as a useful exercise to pursue this matter. I make no finding about it.

5. It was after 15 August 1997 that the application now to be considered was made to this Court. But the respondent and his solicitor must have been aware of the appellant's wish to appeal once the Summons in the High Court was served. That would have been no later than the end of June, within a month of the expiry of the period for appeal.

The evidence on the point is not explicit, but it would appear likely that, if the appellant and his solicitor had known in late April or May that the order had been sealed on 22 April 1997, an attempt would have been made to file the appeal within time. They were not aware of what had happened because a sealed copy of the order was not served. They only learnt of the fact that the order had been sealed shortly before the application to the High Court was made at the end of June.

Counsel for the appellant has strongly submitted that it was improper for the appellant's solicitor not to have served a copy of the sealed order at the time the order was entered. But the Rules of the High Court make no provisions for service of sealed orders. That, I believe, is the usual situation in other jurisdictions. A party may have an order entered but is not obliged to serve it until steps are taken to enforce the order. In other jurisdictions the matter does not have the significance it has here because the period for appeal is not usually fixed in relation to the time an order is entered or sealed but is fixed by reference to the date when final judgment was delivered. Periods of 21 days or 28 days are usually specified as the period within which an appeal may be brought as of right. Time for appeal then runs irrespective of whether the order has been sealed or entered. In Fiji the matter is of critical importance because it determines the commencing point of the period within which an appeal may be filed.

The matter was referred to by the learned President in the judgment to which I have referred in Sundar v Prasad. His Lordship said (at p.5) that he was unable to find any rule or practice direction that required a party sealing or perfecting a judgment to serve a copy on the other party. He said that, in the absence of any such rule or practice direction, the prudent thing for any prospective appellant to do was to search the file or make an application for an extension of time, if possible within the time allowed for an appeal. His Lordship went on to say that he agreed that it made good sense that, as a general rule, any party perfecting a judgment should automatically serve a copy on the other party even if there were no rule requiring this to be done. His Lordship added, "Everyone will benefit from such a practice. Nevertheless in the absence of any such rule

the onus always remains with the Appellants to act expeditiously and in compliance with the prescribed Rules". Because the date of the sealing of an order fixes the time when the period for an appeal begins to run, I respectfully agree that good practice requires a party who has had an order sealed to serve a copy of it on the other party. I would respectfully suggest that it may be as well if there were, if not an amendment to the rules, then a practice direction which would enable members of the profession to know what was required of them. With respect, I do not think that the matter should be left for the profession to ascertain from judgments. There needs to be more general notice of what seems to be a desirable practice.

Nevertheless, the solicitor for the respondent was quite right to take the view that he was not bound to serve a sealed copy of the order. It was, as he submitted was the case, the appellant's obligation to be astute to the fact that the orders made on 18 April 1997 might be sealed by the respondent at any time. Thus I cannot take the adverse view of the conduct of the respondent's solicitor which has been urged upon me in written submissions lodged on behalf of the appellant. I would regard the matter rather as an unfortunate oversight by the appellant's solicitor and, of course, a matter which I must take into account in determining whether or not leave to appeal should be granted.

I next come to the prospects of success of the proposed appeal. I propose to limit my consideration of the matter to the question whether there is an arguable point based upon the provisions of the Act upon which the appellant relies to establish that he has a tenancy of the land.

In order to come to the question, it is necessary to refer briefly to some of the provisions of the Act. "Contract of Tenancy" is defined in s.2 of the Act to mean any contract express or implied or presumed to exist under the provisions of the Act, that creates a tenancy in respect of agricultural land or any transaction that creates a right to cultivate or use any agricultural land. "Tenancy" is defined to include a lease, sub-tenancy, a sub-lease or a tenancy at will. The primary judge in the present case has held that there was no contract of tenancy. There is thus an initial question whether the remaining provisions of the Act upon which the appellant relies have application. The next provision is s.7 which relevantly provides that, except in the manner provided by the Act, no contract of tenancy of any agricultural land subsisting at the commencement of the Act or thereafter is to be terminated by the landlord or by the tenant of such land within the term fixed by such contract or during an extension granted in accordance with the provisions of the Act.

Section 13 provides for the extension of contracts of tenancy. Subject to the provisions of the Act relating to the termination of a contract of tenancy, a tenant holding under a contract of tenancy created before or extended pursuant to the provisions of the Act in force before the commencement of the Agricultural Landlord and Tenant (Amendment) Act 1976 on 1 September 1977, shall be entitled to be granted a single extension (or a further extension as the case may be) of his contract of tenancy for a period of 20 years unless, during the term of the contract, the tenant has failed to cultivate the land in a manner consistent with the practice of good husbandry or the contract of

tenancy was created before the commencement of the Act and had at the commencement of the amending Act in 1976 an unexpired term of more than 30 years.

Part III of the Act provides for agricultural tribunals and a committee of valuers. Part IV of the Act provides for the powers and duties of tribunals. Section 16 provides for the establishment of tribunals, s.17 for the sittings of tribunals and s.18 for the powers of tribunals. The powers there specified are not of relevance to the matters in question here. But s.22, which is in Part IV, deals with the functions of tribunals. There one finds the essential powers of tribunals provided for. None of these expressly empowers the tribunal to extend the period of any tenancy but s.22(1)(k) provides that a tribunal may exercise any other power or duty conferred or imposed by or under the provisions of the Act.

Section 37 provides for the circumstances in which a landlord may terminate a contract of tenancy. In the appellant's submission this is the applicable provision in the present case. His complaint is that the appellant has not purported to act pursuant to s.37 to bring the tenancy to an end. If he had done so, he would have had to give the notice provided for in the section and there would have been applicable provisions, in the event that it were established that there were breaches of the contract of tenancy by the appellant, enabling relief against forfeiture to be given. The tribunal has jurisdiction under the section. Section 38 is also of relevance.

Prior to this Summons coming on for hearing, the solicitors for the parties had been directed to make written submissions. This they did. Extensive submissions were made by the appellant's solicitor relating to the appellant's tenure. These were not answered in the written submissions of the respondent's solicitor. Those submissions essentially relied upon the delay. It was said that the omissions on the part of the appellant's solicitor provided a sufficient reason why leave should not be given.

After I had read the submissions and realised that the respondent's submissions had not dealt with the question of the prospects of success of the appellant in any appeal, I gave both parties the opportunity of making oral submissions. This was done on 25 November. At the same time I raised questions concerning the practice relating to the service of orders after they had been sealed. I gave each party leave to put in further written submissions provided they were lodged no later than 26 November. I have read the two sets of submissions which were received but they do not, in my opinion, take the matter further. Counsel for the respondent had made it clear in his oral submissions that he contested the construction of the Act contended for by counsel for the appellant. Appended to the respondent's submissions were copies of two decisions of the Tribunal. I have read these but they do not appear to me to shed direct light on the question which is in issue. In those circumstances, it is unnecessary to refer further to the new submissions put in on behalf of each of the parties.

The material before the Court suggests that the tribunal as it existed prior to the 1976 amending Act coming into force had granted an extension of 10 years from 1

January 1974. Indeed, in para 14 of its counter-claim, the respondent pleaded that the appellant was originally the lessee of the land pursuant to a lease registered on 18 December 1957 for a period of 21 years from 1 January 1952. Paragraph 16 of the counter-claim pleads that the then tribunal had granted an extension of the period of the lease of "not less than 10 years from 1 January 1974".

I was referred by counsel for the appellant to s.13 in the form in which it was before the 1976 amendment. I will not go to the terms of the section as it was then but, as I understood him, counsel for the appellant contended that the Act in its then form provided for the grant of extensions by the tribunal. He said that there was no power in the present tribunal to grant an extension and that the tribunal had had no such power to grant an extension since the 1976 amending Act came into force.

The problem I have with this submission is that the provisions of s.13 say that a tenant holding under a contract of tenancy created before or extended pursuant to the provisions of the Act in force before the 1976 amending Act is to be entitled to be granted a single extension (or a further extension as the case may be) of his contract of tenancy for a period of 20 years. Counsel for the appellant strongly submitted that the correct view of the legislation was that there was an automatic extension of 20 years and that, there being no express power vested in the new tribunal to grant such an extension, each contract of tenancy in force before the 1976 amendments was automatically extended for 20 years from the date of the expiry of the tenancy or an extension thereof granted by the earlier tribunal before the amendments took effect.

Because of the use of the word "granted" in the section I was originally inclined to take the view that the argument was most unlikely to succeed. But the absence of specific provisions in the legislation dealing with the tribunal's powers in this regard has caused me to wonder whether my initial view was correct. Bearing in mind the nature of this application, it would be quite undesirable for a single judge of this Court to express any view on the matter at all other than to conclude whether or not there was an arguable case. In my view there is an arguable case, but in saying that I ought not to be taken as having decided the point or as having expressed any view whatever on what the outcome of any appeal based on the point is likely to be.

The next matter I should consider is possible prejudice to the respondent. No particular matter of prejudice has been raised in the respondent's evidence. Any delay to a successful party receiving the fruits of a judgment is, of course, prejudicial. But the appellant would have had an appeal as of right if he had filed the notice of appeal on or before 3 June. If I now give leave to appeal and provided that the appeal is instituted within 7 days of my order, it will be early in December when it is filed. A period of 6 months will thus have elapsed between the final day for appeal and the time when an appeal is actually instituted. Part of that period has been taken up with the understandable need by the respondent to resist this application but in the circumstances I do not regard 6 months in the context of this case as involving prejudice of such a kind as of itself to warrant the dismissal of the application.

I agree with counsel for the appellant that the point he wishes to raise is a point of substantial public importance. If the point is good, it may have a material bearing on numbers of contracts of tenancy which exist in this country. I agree with counsel for the respondent that the appellant's solicitor has been guilty of a degree of carelessness in failing to search at the Registry of the High Court to make sure that there had been no application to seal the order on behalf of the respondent. The fact is that he did not and the person who may suffer as a consequence of this will be the appellant rather than the solicitor. The solicitor was also careless in making application in the first instance to the High Court. That was a plain error. It is sometimes said that clients should not be visited by the sins of omission of their legal advisers. But the other side of the coin is that parties affected by what those solicitors fail to do are not only the clients whom they represent but the other parties to the litigation. There is an increasing sympathy for the view that problems of this kind are not solved by overlooking the default of the solicitor, but by leaving it to the client to bring an action for negligence so that damages will be recovered as a consequence of the solicitor's breach of duty.

The task of a judge in a matter of this kind is always difficult. The discretion which has to be exercised must be exercised in a balanced way. Having reflected on the matter, and not without some misgiving, I have reached the conclusion that I should make the order which is sought.

I have thought about conditions. Unquestionably there ought to be a condition imposed that the appeal be lodged within 7 days of today and that it be prosecuted

expeditiously. Any failure in that regard may result in its dismissal. There will also be security provided pursuant to the provisions of Rule 17 of the Court of Appeal Rules in relation to security. The operation of this rule will ensure that sufficient security is provided. Furthermore, non-compliance with the provisions of Rule 17 may result in the permanent stay or the dismissal of the appeal. In the light of the history of the matter, it is unlikely that either this Court or the Supreme Court will have a great deal of sympathy for the appellant if there are any further omissions to comply with rules or provide security which is ordered.

Before concluding, I should mention the application for a stay of proceedings. Neither party referred to this matter in either their written or oral submissions. It may be that there is some agreement about the matter of which I have not been informed. But in the absence of any submission about the application, I have not dealt with it. The view may be taken that it would be a proper case for a stay because execution of the judgment would take away from the appellant the subject matter of the litigation. If a stay is still required a fresh application can be made. Of course, if the appellant does not provide the security which will be required pursuant to Rule 17, there may be a problem about the continuation of any order for a stay.

In the result the orders of the Court are:-

1. The appellant be granted leave to file his proposed notice of appeal annexed to the affidavit of Abdul Karim sworn on 28 June 1997 and filed in the High Court in

proceedings HBC 0176 of 1979 provided such notice of appeal is filed in the Registry of this Court on or before 5 December 1997.

2. The appellant prosecute the appeal with due expedition.

3. The appellant pay to the respondent in any event the sum of $400.00 within 14 days by way of costs in respect of the proceedings in the Court of Appeal so far.

4. These costs are to be paid within 28 days.

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Mr. Justice I. F. Sheppard
Justice of Appeal