

IN THE FIJI COURT OF APPEAL AT SUVA  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0061 OF 2000  
(High Court Civil Action No. HBC527/96S)

BETWEEN:            NATIONAL BANK OF FIJI

Appellant

AND:                GREGORY LAWLOR

Respondent

In Chambers:      The Hon. Madam Justice Nazhat Shameem

Hearing:            5<sup>th</sup> October 2000

Counsel:            Mr. W. Clarke for the Appellant  
                          Mr. G.E. Leung with Ms S. Sorby for the Respondent

Date of Judgment:    Tuesday 10<sup>th</sup> October 2000

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DECISION ON LEAVE TO APPEAL  
OUT OF TIME

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On 31<sup>st</sup> May 2000, Pathik J delivered judgment for the Plaintiff in the sum of \$100,000.00 plus interest and costs. The judgment was perfected on 6<sup>th</sup> June 2000. No notice of appeal was filed within the 6 week time limit stipulated in Rule 16(b) of the Court of Appeal Rules Cap 12.

On 13<sup>th</sup> September 2000 the Respondent's solicitors wrote to the Applicant's solicitors advising them that the time for appeal had expired and that payment of \$100,000 with interest should be paid within 7 days, failing which winding up proceedings would be instituted.

On 25<sup>th</sup> September 2000, the Applicant made this application to extend the time within which Notice of Appeal could be filed.

The application is supported by the affidavit of Robert Escudier and Renee Lal. The grounds set out explaining the delay are that the grounds of appeal are meritorious, and that the Applicant's solicitors thought, (mistakenly) that the Court of Appeal Amendment Rules 1999 had removed all time limits in respect of appeals to the Fiji Court of Appeal.

The application is vigorously opposed by the Respondent. The affidavit of Gregory Lawlor states that he has already been prejudiced by the delay in the case, that he should not be penalised because of the negligence of the Applicant's counsel, that the Court of Appeal (Amendment) Rules 1999, did not affect time limits in appeals, and that the interests of justice demanded a refusal of this application.

The application was heard in chambers on 5<sup>th</sup> October 2000. The grant or refusal of an application to appeal out of time is subject to a wide discretion. Relevant considerations include the reasons for the delay in filing, any prejudice to the Respondent, the history of the case and the general justice of the matter. The New Zealand Court of Appeal in Avery -v- No. 2 Public Service Appeal Board and Others (1973) 2 NZLR 86 (per Richmod J) said as a general statement of principle at p.91:

"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."

A mistake made by the Applicant's solicitors may be relevant, if it has not misled the Respondent to his/her disadvantage (Avery -v- Public Service Appeal Board (supra) Kenneth John Hart -v- Air Pacific Ltd. Civil Appeal No. 23/83).

The nature of the appeal itself is generally not considered, although it was considered as part of the "interests of justice" consideration by Barker JA in Kenneth Hart (supra).

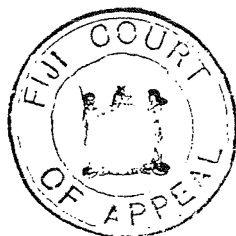
Turning to the circumstances of this case, the writ was filed in October 1996. Pathik J's decision was perfected on 6<sup>th</sup> June 2000, almost four years later. The Applicant did nothing to institute an appeal, other than inform the Respondent by letter that there would be an appeal on June 26<sup>th</sup> 2000. Thereafter, no steps were taken to institute an appeal, until the Respondent's solicitors informed the Applicant's solicitors that they would institute winding up proceedings if the judgment debt was not paid.

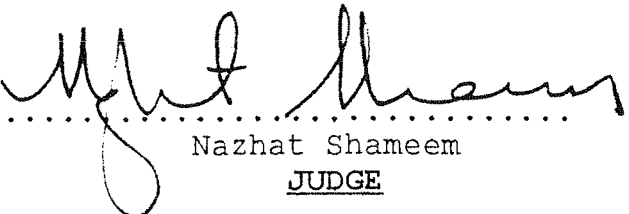
The Applicant says that his solicitors thought there was no time limit on the filing of the appeal. It is clear on a cursory perusal of the Court of Appeal (Amendment) Rules 1999, that there is no amendment to Rule 16 of the Rules Cap. 12. Furthermore,

with or without a time limit, the Applicant appears to have been unmoved by the fact that the Respondent from 6<sup>th</sup> June to 25<sup>th</sup> September, was being deprived of the results of the success of the case.

Further, I am satisfied that the Respondent continues to be prejudiced by the delay in the conduct of the case. I accept that he has spent time, money and resources on the litigation involved in the case, and that he gave the Applicant ample opportunity to move on the appeal for 6<sup>th</sup> June to 13<sup>th</sup> September 2000.

Finally, I do not consider that the circumstances of the case (including the grounds of appeal) justify the extension of time to four months after the judgment was perfected. This application is refused. The Applicant must pay the Respondent's costs to be taxed if not agreed.



  
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Nazhat Shameem  
JUDGE

Solicitors:

Messrs. Jamnadas, Clarke & Associates for the Appellant  
Messrs. Howards for the Respondent