

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

CIVIL APPEAL NO. ABU0034 OF 2002
(High Court Civil Action No. 282 of 2002)

IN CHAMBERS

BETWEEN: NAUTICAL PILOTS CO. (FIJI) LIMITED

Applicant

AND: PORTS TERMINAL LIMITED

Respondent

Mr R.P. Singh for the Applicant
Mr H. Lateef for the Respondent

Date of Hearing: Tuesday, 10th September, 2002

Date of Decision: Tuesday, 17th September, 2002

DECISION

This is an application for leave to appeal out of time from a decision of the High Court, refusing leave to appeal out of time from a decision of the Magistrates' Court. Before dealing with the application, it will be convenient to set out the background facts leading to it.

THE RESPONDENT'S CLAIM (ORIGINAL PLAINTIFF)

In the Magistrates' Court at Suva (Action No.401 of 1999), the Respondent claimed from the Applicant a sum of \$8,684.50 on account of "demurrage for storage and other charges pursuant to tariff regulations". The particular tariff regulations was not mentioned. The Statement of Claim alleged that the Applicant imported into Fiji a hulmatic designed pilot

vessel (pilot vessel), which arrived at the port of Suva on 16th October 1998, was unloaded from a ship "and docked at the wharf". It was not cleared within 72 hours and remained docked at the wharf for 100 days, from the 16th of October 1998 to 23rd of January 1999. Because of the nature of the cargo (the hulmatic vessel being a boat) it remained docked instead of being taken into bond.

THE APPLICANT'S DEFENCE (ORIGINAL DEFENDANT)

By an amended defence dated 17th January 2000, the Applicant denied liability. The Applicant also annexed to the statement of defence copy of an affidavit sworn by Captain Malcolm Peckham (Peckham) on the 15th of April 1999, and filed in certain High Court Proceedings (No. HBE 17 of 1999). Peckham deposed that the hulmatic vessel did not attract any demurrage charges because it was not "stored or bonded" at an inland freight station, that it was unloaded from the dock "straight into the water alongside Princess Wharf", and that dockage charges in the sum of \$676.00 were paid to Maritime & Ports Authority of Fiji by the Applicant. Peckham also deposed that security for the pilot vessel was provided by the Applicant from the 10th of October 1998 to 12th of November 1998.

HEARING - MAGISTRATES' COURT

The Action was set down for hearing on the 15th of January 2001. There was no appearance for the Applicant. Apparently, the Respondent by its Counsel explained how the \$8,684.00 was calculated under Regulation 13(1) of the Ports Authority of Fiji (Tariff) Regulations 1995, that being the first occasion when the particular Regulations was mentioned. From the material placed before me, it is not clear if any evidence was led.

On the 18th of January 2001, the learned Magistrate entered judgment for the Respondent. He also allowed costs at \$275.00. The Applicant did not appeal from the judgment. On the 13th of March 2001, the Applicant filed a motion to set aside the judgment, which was heard on the 15th of June 2001. The learned Magistrate made an Order setting aside the judgment, but conditional on the Applicant paying \$8,684.50 into Court within 21

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days. That amount was not paid. Some 9 months later, the Applicant again applied to the Magistrate to set aside or vary the Order, alternatively, for leave to appeal out of time from the Order to the High Court.

The learned Magistrate dismissed the application on the ground that it was misconceived because it was brought under Order 30 Rule 5 of the Magistrates' Court Rules which empowers the Court to set aside judgments obtained in the absence of a party. He allowed the Respondent costs fixed at \$120.00. It appears that that decision was given in February 2002. Thereafter, the Applicant applied to the High Court.

APPLICATION TO THE HIGH COURT

On the 2nd of July 2002 the Applicant, by Summons applied to the High Court for leave to appeal out of time from the judgment of the Resident Magistrate given on the 18th of January 2001. That was the only application before the Court. The High Court (Pathik J.) refused the application because of "excessive delay" in applying. The learned Judge noted that the Order made by the Resident Magistrate for payment into Court was ignored "for a whole year". He said that no good reasons were advanced for the delay, and concluded that leave to appeal would be unjust to the Respondent. Pathik J. did not go into the merits of the proposed appeal, although the proposed grounds of appeal were before him.

PRESENT APPLICATION

The Applicant has now come to this Court. By Summons dated 24th of July 2002, he seeks leave to appeal out of time from the decision of Pathik J. given on the 15th of July 2002. The application is supported by an affidavit filed on the 24th of July 2002.

THE DELAY

The judgment in question was given on the 18th of January 2001. The application for extension of time to appeal was made on the 2nd of July 2002. The Applicant accepts that

there has been delay in applying for leave to appeal. The explanation for the delay is that it was due to "mistake" and "unavailability" of the Applicant's solicitor.

Furthermore, Mr Howard for the Applicant told Pathik J. that he did not have the money to pay into Court as required by the Magistrate's Order. This is probably true. Nonetheless, the delay has been substantial, and Mr R.P. Singh for the Applicant submits that notwithstanding the delay, the Applicant should be given leave to appeal out of time because the charges raised by the Respondent for "storage" of the pilot vessel are not authorized by the regulations. To deny the Applicant an opportunity to challenge the judgment would be unjust to him, and he points out correctly, that the question of merits of the proposed appeal, was not addressed by Pathik J. It appears that learned Counsel appearing before Pathik J. did not address him on the merits of the proposed appeal.

MERITS OF PROPOSED APPEAL

The Applicant says that the Respondent did not have a cause of action, and that the judgment is irregular, and should not have been entered. The matter comes down to the question whether Regulation 13(1) and Table 12 (being part thereof) permitted the Respondent to levy the storage charges in respect of the pilot vessel.

" ***Storage charges - Cargo***
13. (1) ***Subject to this regulation, where goods are stored on the Authority's premises the owner of those goods shall pay storage charges to the Authority calculated in accordance with Table 12.***"

Table 12, prescribes the chargeable rates for goods stored in containers, and goods stored in premises other than in containers. Goods stored in premises other than in containers are further classified between those that are stored under cover ("covered storage") and those that are kept in the open ("open storage"). Different rates are chargeable. In the instant case, the pilot vessel was not kept in "covered storage". But was it in "open storage"?

Mr Lateef says that although the pilot vessel was offloaded into the water at the wharf,

it was nonetheless "stored within the Authority's premises" within the meaning of regulation 13. Furthermore, he says that the pilot vessel was in "open storage", and the Respondent was entitled to levy storage charges applicable for open storage and prescribed in Table 12. Mr R.P. Singh for the Applicant contends otherwise. He says that the word "premises" in Regulation 13, means buildings and land and includes containers on that land. It does not include the wharf where the pilot vessel was docked, and that is why he says the Maritime & Ports Authority of Fiji levied and collected dockage charges from the Applicant, in the sum of \$676.50 for the period when the pilot vessel was docked at the wharf.

In the case of Hobhouse and Others v Wall [1963] 2 All E.R. 604, at p.608 Upjohn L.J. said:-

" We were very properly referred to a number of authorities as to the meaning of the word "premises," and, indeed, there is a long list to be found set out in Stroud's Judicial Dictionary (1953), 3rd ed., Vol. III, p. 2272 et seq. As Turner L.J. pointed out in Lethbridge v. Lethbridge⁶ : "there is no doubt, on the other "hand, that the word admits of a limited as well as an enlarged "sense, and that the context and surrounding circumstances must "determine whether it was used in an enlarged or in a limited "sense." For my part, I do not think that one is really assisted by authorities on wills or other statutes. We must construe the words of the section and, as I have already said, I do not think it is one which is easy of solution."

I have considerable reservation whether the pilot vessel was in "open storage" when it was docked at the wharf. The wharf does not in my view come within the meaning of "premises" in the regulation.

In my view there is merit in the argument put forward on behalf of the Applicant. I have not found this a simple matter to determine, nor am required to do so at this stage. I am of the view that the Applicant should have the opportunity to canvass the issue before the full Court and leave to appeal out of time should be given.

Mr Lateef for the Respondent argued that the Respondent will be prejudiced if leave is given, that he has waited long for the fruits of its judgment, and should not be deprived of it any longer. On the other hand if the Respondent has no legal authority to levy the charges

that it did, it would be unjust if the Applicant is now compelled to pay the levy merely because of the delay. It is a matter of balancing those two competing considerations.

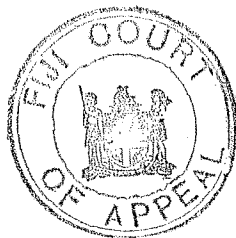
This Court has wide and unfettered discretion to extend the time for appealing, if it is in the interest of justice to do so. In my view this is a proper case in which leave to appeal out of time must be given, notwithstanding the long delay in making the application after the judgment was given.

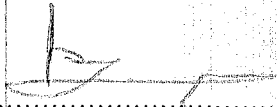
ORDER

Accordingly, I give the Applicant leave to appeal from the judgment of Pathik J. given on the 15th of July 2002 refusing the Applicant leave to appeal out of time to the High Court, from the judgment of the Resident Magistrate given on 18th of January 2001.

However, to ensure the prompt disposal of this appeal the leave is granted on condition that:

1. The Applicant shall file and serve the notice of appeal within 7 days of the date of this Order.
2. Security for costs is fixed at \$750.00, and the Applicant shall pay the said sum into Court within 14 days of this Order.
3. The Appellant will comply with Rule 18(A) of the Court of Appeal Rule within 21 days of this Order.
4. In the event of non-compliance leave shall be deemed revoked.




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Jai Ram Reddy *
President