

**TURTLE AIRWAYS LTD**

v

**KERRY F. THOMAS**

[COURT OF APPEAL, 1994 (Tikaram, Williams, Thompson JJ.A.),  
24 February]

*Practice (civil)-application for leave to appeal to the Supreme Court-need to specify the question involved—principles governing applications-Supreme Court Decree 47/1991 Section 8(1)(c)-Supreme Court Rules 1992 rr 5(1), 5(2).*

Upon application being made for leave to appeal to the Supreme Court the Fiji Court of Appeal considered the relevant provisions and the principles governing the grant of such applications. The need to comply with the rules was emphasised.

Cases cited:

*Benmax v. Austin Motor Co. Ltd* [1955] 1 All E.R.326

*Buckle v. Holme* (1926) 2 K.B.125.

*Crowther v. Elgood* (1887) 34 Ch.D.691

*Egerton v. Jones* [1939] 3 All ER889

*Evans v. Bartlam* [1937] A.C.473

*G. v. G.* [1985] 1 W.L.R.647; [1985] 2 All E.R.225, H.L.

*Rich v. Christchurch Girls' High School Board of Governors*  
(No. 2) [1974] 1 NZLR 21

*Young v. Thomas* [1892] 2 Ch. 134

Application for leave to appeal to the Supreme Court.

*T.J. Castle* with *A. Rana* for the Applicant

*S.J. Stanton* with *V. Maharaj* for the Respondent

**Judgment of the Court:**

This is an application for leave to appeal to the Supreme Court pursuant to Section 8(1)(c) of the Supreme Court Decree 1991.

**Background**

In fact there are two applications before us - both identical in nature and both by the same Applicant namely Turtle Airways Ltd which was the 1st Defendant in two separate High Court Civil Actions - Nos. 1024 of 1983 and 1025 of 1983. In the first Action Kerry Frances Thomas, the Respondent herein, was the Plaintiff and in the second the Plaintiff was Owen Clive Potter who is now

the Respondent in the other application, i.e. in Civil Appeal No. 49 of 1992. In this judgment we refer to Mr Thomas and Mr Potter as the Respondents. By consent of counsel involved both applications were heard together and it was agreed that the decision in this application will apply to the decision in the other case too as the issues are identical.

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On 23.11.81 both Respondents were passengers in the Applicant's plane flying from Nadi to Nausori. An accident occurred on this date before the plane reached Nausori and both Respondents were allegedly injured. They commenced their individual Actions in the Court below on 11.11.83 claiming damages based on negligence of the Applicant Company as well as that of the pilot who was named as the 2nd Defendant in both Actions, but who no longer features in these proceedings as apparently he was never served.

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The Writs and the Statements of Claim were issued in both cases on 11th November, 1983. They were apparently not served until 1985. Appearances were entered on 16th April, 1985.

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On 22nd April, 1985 the Applicant filed its defence in both Actions. Thereafter there is no record of anything happening until 17th June, 1992 when the present Respondent filed a notice of change of Solicitors and a Notice of Intention to proceed pursuant to the requirements of O.3 r.5.

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In July, 1993 both parties issued summonses, the Respondents for direction and the Applicant for dismissal for want of prosecution.

### Decision of the High Court

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Scott J. heard first the Applicant's application for dismissal in Civil Action No. 1024 of 1983. In a written decision delivered on 18th September, 1992 he allowed the application and concluded as follows:

"In these circumstances I am of the view that to allow the matter to proceed to trial at this stage would result in a substantial risk of unfairness. Accordingly I hold in favour of the 1st Defendant and order that the Plaintiff's action be dismissed."

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On the same day His Lordship also allowed the Applicant's application in respect of Civil Action No. 1025 of 1983 and ruled as follows:

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"The facts in this matter are identical to those in Action No. 1024 of 1983; and for the same reasons I allow the 1st Defendant's application and dismiss the Plaintiff's action."

### The Decision of the Court of Appeal

Both Respondents appealed to the Fiji Court of Appeal against Scott J.'s decision, in Civil Appeals Nos. 50 of 1992 and 49 of 1992 respectively. By

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A consent both appeals were heard together as the issues were identical. On 20th August, 1993 the Court of Appeal allowed both appeals, set aside the judgment in the High Court and ordered that the applications for directions and every other step should now be pursued with alacrity by the Respondents. It also ordered that the costs of the Respondents be costs in the Actions. The Court (per Helsham P. and Kapi J.) held -

B “For reasons we have set out earlier herein we do not believe that the defendant company is likely to be seriously prejudiced if the action is allowed to go on, and we do not believe there has been an inordinate and inexcusable delay that might cause this.”

**The Application for Leave**

C It is from that decision that the Applicant now seeks leave from this Court to appeal to the Supreme Court in respect of both cases.

As stated at the outset leave to appeal is sought under the provisions of Section 8(1)(c) of the Supreme Court Decree 1991.

D **The Provisions of Section 8(1)(c) of the Supreme Court Decree 1991**

We set out hereunder the whole of Section 8 of the Decree as in order to ascertain the meaning and purpose of subsection (1)(c) it is necessary to have regard to its context. It reads:

E “8.-(1) An appeal shall lie from decisions of the Court to the Supreme Court in the following cases, that is to say:

- (a) from final decisions in any appeal to the Court on any constitutional questions; and
- F (b) from final decisions in any civil proceedings where the matter in dispute is of the value of 20,000 dollars or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 20,000 dollars or upwards.
- G (c) with the leave of the Court from decisions in any civil proceedings where in the opinion of the Court the question involved in the appeal is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Supreme Court.
- (d) in such other cases as may be prescribed by law.

(2) Nothing in this section shall affect the right of the Supreme Court to grant special leave to appeal from the decision of the Court in any civil or criminal matter.”

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S.8(1)(c) of the Supreme Court Decree 1991 is identical with the provisions of Section 117(2)(a) of the Fiji Constitution of 1990.

**The Need to Specify the Question Involved**

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Rule 5(1) of the Supreme Court Rules 1992 requires that an application for leave to appeal be made by notice of motion. Rule 5(2) provides that -

“The Notice of Motion shall specify the question involved in the appeal which by reason of its general or public importance ought to be submitted to the Supreme Court.”

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According to Collins New English Dictionary (1968) “specify” means “to state definitely; to give details of; to indicate precisely”.

Reading Section 8(1)(c) and Rule 5(1) together it is clear that the Applicant is not only required actually to specify the question involved in the proposed appeal but it also carries the burden of satisfying this Court that the question “ought” to be submitted to the Supreme Court “by reasons of its great general or public importance or otherwise.”

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**The Draft Grounds of Appeal**

Mr Castle for the Applicant has referred us to the proposed grounds of appeal attached as exhibit ‘A’ to the affidavit in support of the motion and has argued that these satisfy the requirement of specifying the question involved. The proposed grounds of appeal read as follows:

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- “(1) that the learned appeal judges were wrong in finding that the delay in prosecution of the action was not inordinate and inexcusable;
- (2) that the learned appeal judges were wrong in finding the First Respondent was not likely to be seriously prejudiced by the continuance of the action;
- (3) that the learned judges of appeal were wrong in holding that the trial judge erred in finding that to allow the action to proceed to trial would result in a substantial risk of unfairness;
- (4) that the learned appeal judges misdirected themselves in deciding that the word ‘inordinate’ when applied

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A to the delay in prosecuting a case sought to be set aside on that ground, enables a Judge to move in a way that he considers will provide a just result.”

B We agree with Mr Stanton, learned counsel for the Respondent, that these grounds of appeal do not disclose with any particularity where and how the Court of Appeal went wrong and nor do they encapsulate the question or questions that ought to be submitted to the Supreme Court to satisfy the requirements of Rule 5(2). All that the first 3 grounds do is to allege that the judges “were wrong” in reaching their conclusions. The fourth ground alleges misdirection but it does not particularise the misdirection nor does it specify with any clarity the question that ought to be put to the Supreme Court. There is nothing in the affidavit itself to specify the question that ought to be submitted to the Supreme Court. By repeating the grounds of appeal in the affidavit the Applicant has done nothing to enlighten us further.

**The Issues Involved**

D Be that as it may, we think that the failure to satisfy strictly the intended requirements of Rule 5(2) is not necessarily fatal to the Applicant’s case; we allowed Mr Castle to develop his argument further, which he did orally and in his written synopsis of his submissions. However, the essence of those submissions was that on the particular facts and circumstances of this case the Court of Appeal was not entitled to substitute its discretion for that of the Chamber Judge. That was the Applicant’s real complaint. From it emerge two questions -

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- (a) Did the Court of Appeal have power to do what it did? and
  - (b) What constitutes inordinate and inexcusable delay?

To use Mr Castle’s own words:

F “it is highly desirable that the Supreme Court of Fiji should give final judgment on the following issues -

G (a) In what circumstances the Fiji Court of Appeal should interfere with the exercise of a discretion by the High Court?

(b) What is the correct approach, in law, by the Courts of Fiji to the striking out of civil proceedings for want of prosecution and in particular the manner in which Courts should determine whether or not any delay in the prosecution of civil proceedings is inordinate and inexcusable and/or has resulted in prejudice for the party against which the proceeding has been issued, such that proceedings should be dismissed.”

We agree with Mr Castle that it is sufficient for the Applicant to demonstrate on a balance of probabilities that the issues in the appeal (whether final or not) are either -

- (i) of great general importance; or
- (ii) of (great) public importance; or
- (iii) otherwise by reason of which, the appeal ought to be submitted to Supreme Court.

**Issue (a)**

As to issue (a), all that really needs to be said is that the law reports abound with cases where an Appellate Court has found it necessary to interfere with the exercise of a discretion by a lower Court. The principles on which an Appellate Court acts are well established. We accept that there are many authorities for the proposition that an appeal will not be allowed from an order which it was within the discretion of the judge to make, unless it be shown that he exercised his discretion under a mistake of law (Evans v. Bartlam [1937] A.C.473) or in disregard of principle (Young v. Thomas [1892] 2 Ch. 134) or under a misapprehension as to the facts (*ibid.*); or that he took into account irrelevant matters (Egerton v. Jones [1939] 3 All E.R.889, p.892, C.A.) or failed to exercise his discretion (Crowther v. Elgood (1887) 34 Ch.D.691, p.697), or that the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible" (G. v. G. [1985] 1 W.L.R.647; [1985] 2 All E.R.225, H.L.). See 'The Supreme Court Practice, 1993' (Vol. 1) O.59/1/51 at pages 940-1.

In the present case if we look at the 2 judgments collectively it is abundantly clear that Court had regard to the submissions made, scrutinized the relevant authorities and gave its reasons why it found it necessary to interfere with the lower Court's exercise of discretion. Indeed at p.9 of Sir Edward Williams' judgment particular mention is made by him of the restrictions placed on interfering with any discretion exercised by a lower Court. He then goes on to quote a relevant passage from Birkett's Case cited earlier in his judgment. For our present purposes we cannot go into the actual merits of the intended appeal. We would adopt the following principle cited by the New Zealand Court of Appeal (per Richmond & Beattie JJ) in Rich v. Christchurch Girls' High School Board of Governors (No. 2) [1974] 1 NZLR 21 at p.22 -

"Where it is alleged that important questions arise on the appeal something more must be shown than that an important question of law may be involved. It must be shown to the satisfaction of the Court that the question involved is one

A which, by reason of its great general or public importance, ought to be carried further.”

In our opinion the question raised by issue (a) is not of great general or public importance requiring the attention of the Supreme Court; the circumstances in which the Court of Appeal can or should interfere with the exercise of a discretion by the High Court are well settled by established principles.

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**Issue (b)**

As to issue (b), the crux of the matter is whether there was inordinate and inexcusable delay in the prosecution of the civil proceedings. Whether any delay is inordinate and inexcusable depends on the particular facts and circumstances of each case. Similarly the question of prejudice and unfairness also depends on facts and inferences to be drawn from the facts.

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Rule 22(3) of the Court of Appeal Rules gives the Court of Appeal explicit “power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made”. This power follows from the rule that an appeal to the Court of Appeal is by way of rehearing. (See Rule 15 which provides that an appeal to the Court of Appeal shall be by way of rehearing and shall be brought by notice of motion.)

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In Benmax v. Austin Motor Co. Ltd [1955] 1 All E.R.326 the House of Lords held -

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“An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.”

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**Some Principles**

We would add that Courts elsewhere have formulated some helpful general principles which may be applied to identify the situations where leave should be granted. Two of these are -

- (i) Where the question is of great importance upon which further argument and a decision would be to the public advantage - Buckle v. Holme (1926) 2 K.B.125.



We agree with Mr Castle that it is sufficient for the Applicant to demonstrate on a balance of probabilities that the issues in the appeal (whether final or not) are either -

- (i) of great general importance; or
- (ii) of (great) public importance; or
- (iii) otherwise by reason of which, the appeal ought to be submitted to Supreme Court.

#### Issue (a)

As to issue (a), all that really needs to be said is that the law reports abound with cases where an Appellate Court has found it necessary to interfere with the exercise of a discretion by a lower Court. The principles on which an Appellate Court acts are well established. We accept that there are many authorities for the proposition that an appeal will not be allowed from an order which it was within the discretion of the judge to make, unless it be shown that he exercised his discretion under a mistake of law (Evans v. Bartlam [1937] A.C.473) or in disregard of principle (Young v. Thomas [1892] 2 Ch. 134) or under a misapprehension as to the facts (*ibid.*); or that he took into account irrelevant matters (Egerton v. Jones [1939] 3 All E.R.889, p.892, C.A.) or failed to exercise his discretion (Crowther v. Elgood (1887) 34 Ch.D.691, p.697), or that the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible" (G. v. G. [1985] 1 W.L.R.647; [1985] 2 All E.R.225, H.L.). See 'The Supreme Court Practice, 1993' (Vol. 1) O.59/1/51 at pages 940-1.

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**Issue (b)**

As to issue (b), the crux of the matter is whether there was inordinate and inexcusable delay in the prosecution of the civil proceedings. Whether any delay is inordinate and inexcusable depends on the particular facts and circumstances of each case. Similarly the question of prejudice and unfairness also depends on facts and inferences to be drawn from the facts.

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**Some Principles**

We would add that Courts elsewhere have formulated some helpful general principles which may be applied to identify the situations where leave should be granted. Two of these are -

- (i) Where the question is of great importance upon which further argument and a decision would be to the public advantage - Buckle v. Holme (1926) 2 K.B.125.

(ii) Where the question is one of general principle, decided for the first time - Ex parte Gilchrist (1886) 17 Q.B.D.521.

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Neither of these two principles have any application to the two issues raised by Mr Castle. In our opinion no question of law of great importance is involved in issue (b) and the question is not one of general principle decided for the first time.

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**“Or Otherwise”**

We accept that the phrase “or otherwise” in Section 8(1)(c) of the Supreme Court Decree enables leave to be granted in special cases which are not founded upon a question of great general or public importance (see Rich v. Christchurch Girls’ High School Board of Governors (No. 2) [1974] 1 NZLR 21).

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If, for instance, there was, prima facie, a serious error in the Court’s judgment and inability to appeal to the Supreme Court would result in the Applicant suffering an irreparable injustice, then we believe leave could be granted even though no question of great general or public importance was to be raised. But the Applicant’s situation does not qualify as such a special case for two reasons; first, there is, prima facie, no error of law in the Court’s judgment and secondly, the Court’s decision is only interlocutory, leaving the Applicant further avenues of redress after final judgment has been delivered in the Court below.

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**Conclusion**

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In our opinion the questions or issues involved in the Applicant’s intended appeal are not of great general or public importance and there is no other proper reason for granting leave.

Consequently we refuse leave to appeal to the Supreme Court and award costs to the Respondent.

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Before we dispose of this matter we feel we should say that future Applicants to this Court for leave to appeal will be well advised to comply with the provisions of Rule 5(2) of the Supreme Court Rules 1992.

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**Order**

*Application refused.*

*Costs to Respondent.*