

EDWARD HENRY THOMPSON v ABBAS ALI and 5 Ors (ABU0004 of 2005S)

COURT OF APPEAL — CRIMINAL JURISDICTION

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WARD P

9, 16 February 2005

10 **Practice and procedure — application for leave — Applicant found guilty of contempt of court — Applicant breached interim order by magistrate — court’s discretion to hear application — onus upon Applicant to satisfy court that justice requires him to prosecute his appeal — court has wide discretion — length of delay and reasons for it — chance of success in appeal — degree of prejudice to Respondent — application for leave to appeal out of time allowed.**

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This was an application for leave to appeal out of time from a finding that the Applicant was guilty of contempt of court. The second Respondent (R2) was a land sales company which had sold lots where substantial residential properties have been built. Thereafter, the shareholders of the company quarreled and an interim order has been made which placed the sole management and control of R2 in the hands of the newly elected board of directors which included the first Respondent (R1). The Applicant, despite the interim order, lodged caveats over three lots. It was this action that resulted in the application to commit him for contempt. The interim order was confirmed by a further order made in almost identical terms except that it also recorded that there would be a ruling on notice on the share issue. That ruling was eventually delivered on 22 March 2004.

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It appeared from the affidavit of the Applicant that there was initially some doubt in the mind of his solicitor whether the order was interlocutory or final. The Applicant advised his lawyers to file an application for leave in case it was required. Following the communications with the court registry, the Applicant was advised that he had first to apply for leave to the High Court. The applications were heard on 22 October 2004 and judgment was reserved. On 28 December 2004 the registry advised the lawyers that judgment would be delivered on 29 December 2004 but, as the solicitor’s office was closed for the vacation, the notification was not seen by the Applicant’s lawyers until the office reopened on 5 January 2005. A copy was requested and posted by the registry on 10 January 2005. It was received by the Applicant on 14 January 2005. The application to appeal out of time and the proposed grounds were filed in this court on 1 February 2005.

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The Applicant asked the court to exercise its discretion and to hear the application.

Held — The onus was on the Applicant to satisfy the court that justice required him to be given an opportunity to prosecute his appeal. The court considered the length of the delay, the reasonable prospect of the appeal to succeed and the slight degree of prejudice to the Respondent if leave was granted. In consideration of all those factors, the court granted the application.

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Application allowed.

Cases referred to

Ponsami v Reddy [1996] 42 FLR 160; *Venkatamma v Ferrier-Watson* [1995] 41 FLR 258, cited.

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J. Sharma for the Applicant

S. Maharaj for the Respondents

Ward P. This is an application for leave to appeal out of time from a finding that the Applicant was guilty of contempt of court. The allegation was that the Applicant had breached an interim order made by Gates J on 24 May 2002

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whereby the affairs of the second Respondent had been vested in a new board of directors which included the first Respondent (R1). That order was confirmed by a further order made on 6 August 2002 in almost identical terms except that it also recorded that there would be a ruling on notice on the share issue. That ruling was eventually delivered on 22 March 2004.

The Applicant is not named in the orders but it appears that he was served with them.

The learned judge described the background to the case in the following terms:

The second Plaintiff [the present second respondent] is a land sales company. It holds prime State leasehold land adjoining the Nadi beach. Its business is to develop infrastructure and to sell lots from the sub-division. Some lots have already been sold and substantial residential properties have been built on them. Unfortunately, the shareholders of the company have quarreled. The defendants [including the present applicant] make allegations of abuse of office against the Managing Director [the present first respondent, Abbas Ali] and say his style of management was dictatorial.

After an interim injunction was obtained by the Plaintiffs to prevent the Defendants from dealing with the company's assets or from operating the bank account other than with counter-signatures from the Plaintiffs' faction, the parties agreed, at least for a while, to go forward under the terms of a consent order. This compromise did not last. Things went from bad to worse. Matters in this action were fought tooth and nail, the parties taking out between them some 31 summonses or motions including 6 for contempt ...

The interim order had placed the management and control of the company in the hands of one faction only with safeguards to protect the other. It ordered, *inter alia*, that the "day to day affairs of the Company be vested in the newly elected Board of Directors ... who shall alone have the power to conduct each and all the affairs of the Company as authorised by it from time to time". It further ordered that, until the court had determined the issue of the shareholdings in the Company, the "new Board of Directors shall have the sole control of the company ..."

On 10 December 2003 the Applicant lodged caveats over three lots on the land (nos 19, 20 and 21) describing himself as "equitable mortgagee/ owner". It was this action which resulted in the application to commit him for contempt although the particulars appear to set it wider:

1. That between the 6th day of August 2002 till to-date ... Thompson has interfered and is interfering with the day to day operations of the Company ...
2. That ... Thompson is disrupting the affairs of the Company and preventing the Company from selling the Company Lots.
3. That the lodgment of Caveats by ... Thompson is stopping the sale and subsequent Transfer and settlement of sale of Lot Number 21 ... and will interfere with the processing of sale of Lot 20 ... under negotiation.

The learned judge determined the case on affidavits from the R1 and the Applicant. There was no cross-examination of the deponents and neither counsel requested it.

The order, sealed on 13 April 2004 was:

1. That this Court is satisfied beyond reasonable doubt that the Accused Contemnor ... did disrupt the business of the Company and that he is in contempt of Court's Orders of 24th May 2002.
2. The Accused Contemnor ... is fined in the sum of \$1,000.00 in default of payment he must serve thirty days in prison.
3. That the Accused Contemnor ... to pay a contribution towards the Plaintiff's costs of \$2,000.00

There was some additional injunctive relief in relation to the caveats.

It appears from the affidavit of the Applicant that there was initially some doubt in the mind of his solicitor whether the order was interlocutory or final. The Applicant therefore advised his lawyers to file an application for leave in case it
5 was required.

Following various communications with the court registry, the Applicant was advised he had first to apply for leave to the High Court. He did so and it was listed on 20 June 2004 to fix a date. It appears that, despite the nature of the
10 matter, the first date the court could give was 14 October 2004. The Applicant was then advised to file an application to extend time and did so on 18 October 2004.

The applications were heard on 22 October 2004 and judgment reserved. On 28 December 2004 the registry advised the lawyers that it would be delivered
15 on 29 December 2004 but, as the solicitor's office was closed for the vacation, the notification was not seen by the Applicant's lawyers until the office re-opened on 5 January 2005. A copy was requested and posted by the registry on 10 January. It was received by the Applicant on 14 January.

Application to appeal out of time and the proposed grounds were filed in this
20 court on 1 February 2005.

At the hearing of the application before this court, it became clear that there are other actions between the parties including one against the Applicant to eject him from one of the lots the subject of this application. However, this is an
25 application solely for leave to appeal out of time from the finding that he was guilty of contempt and any other proceedings have no relevance to this application.

The application is strongly opposed by the Respondents. They point out that the fault lies with the Applicant's lawyers. They, it is suggested, have made
30 "blunder after blunder" and there can be no doubt that there have been mistakes.

The importance of compliance with the rules has been stressed frequently by the courts in Fiji. The Supreme Court in *Venkatamma v Ferrier-Watson*
[1995] 41 FLR 258 stressed that the rules are there to be obeyed and that practitioners must understand that noncompliance may well be fatal to an appeal.
35 The same court repeated the warning in *Ponsami v Reddy* [1996] 42 FLR 160 and it has been repeated by this court many times since.

The Applicant does not challenge the force of those authorities but asks the court to exercise its discretion. The onus in such a case is on the Applicant to satisfy the court that the justice of the case requires him to be given an
40 opportunity to prosecute his appeal.

The court has a wide discretion and will consider the length of the delay and the reasons for it, the chance of success in the appeal and the degree of prejudice to the Respondent if leave is granted.

There has undoubtedly been a considerable delay since the judgment of
45 Gates J and the fault lies with the Applicant and his legal advisers although it must be stated that, overall, it was increased by the time the High Court took to determine the application.

Passing to the further grounds for consideration, I do consider that there is a reasonable prospect of the appeal succeeding and, as the appeal relates solely to
50 the contempt finding, the degree of prejudice the Respondent might suffer if the application is granted is slight.

On a consideration of all those factors, I consider this is a case where the application should be granted. The Applicant shall file his notice and grounds within 7 days and the timetable for submissions shall then follow that laid down in Practice Direction 1 of 2004.

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Application allowed.

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