

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

CIVIL APPEAL NO. ABU0061 OF 1998S
(High Court Civil Action No HBC0200 OF 1993S)

BETWEEN:

DOMINION INSURANCE LIMITED

Applicant

AND:

CHIMAN LAL JAMNADAS

Respondent

In Chambers:

The Hon. Justice I.R. Thompson, Justice of Appeal

Date of Decision:

Friday, 27 November 1998

DECISION IN CHAMBERS

On 31 July 1996 Byrne J., in an action by the respondent claiming insurance for loss resulting from a fire, delivered the judgment of the High Court in favour of Mr Jamnadas ("the respondent"). On 2 October 1998 Dominion Insurance Limited ("the applicant") took out a summons seeking an extension of time to appeal against that judgment. Mistakenly the solicitors for the applicant entitled the proceedings so as to show the respondent as the applicant and the applicant as the respondent. I direct therefore, that the title is to be corrected forthwith to show the parties in their correct capacities.

On its face the delay in making the application appears to be so inordinate that it would be unreasonable to grant leave. However, Mr Smith, a partner in the firm of solicitors representing the applicant, has sworn an affidavit which affords an explanation, not wholly satisfactory, of the delay up to May 1997. At the trial there was no dispute about liability; only the amount to be paid by the applicant to the respondent was in issue. The amount awarded was

substantially what the respondent had claimed.

However, it comprised an amount of \$78,700, interest on that amount and any Value Added Tax ("VAT") which the respondent might be liable to pay in respect of that amount and the interest. Within two months of the judgment the applicant paid the respondent \$78,700. Meanwhile the applicant sealed the judgment of the High Court on 20 September 1996.

The parties then entered into negotiation regarding the calculation of the amount of interest payable, the amount of costs to be paid by the applicant and whether (and, if so, how much) VAT was payable on the amount of the judgment. Mr Smith exhibited to his affidavit copies of correspondence between the applicant's solicitors and the respondent's solicitors between 28 October 1996 and 22 July 1997. The letter of 28 October 1996 contains the following paragraph:

"We would record that we have your undertakings that you would consent to our appeal out of time in the event that agreement cannot be reached in connection with the VAT question."

That understanding was confirmed by the respondent's solicitor in a letter dated 7 November 1996. Implicit in the statement in the passage set out above is a concession that the applicant was willing to abide by the High Court's judgment and not lodge an appeal, if the respondent agreed that the applicant should not have to pay any amount in respect of VAT. It is implicit in that statement that the applicant's only concern with the judgment was with the part

of it relating to VAT. Yet the notice of appeal exhibited to Mr Smith's affidavit raises a number of issues relating to the manner in which Byrne J. reached his conclusion that the amount of the respondent's loss was \$78,700. That undermines to a considerable extent applicant's case for an extension of time insofar as it relies on the respondent's undertaking as a reason for delaying the filing of an appeal. If the applicant was dissatisfied with those aspects of the judgment, it could have been expected to appeal immediately after Byrne J.'s judgment was delivered and not to enter into negotiations about the VAT or write a letter containing the passage set out above. It also casts doubt on whether there is any substance to those grounds of the intended appeal.

On 20 December 1996 the applicant's solicitors wrote to the respondent's solicitors informing them that the applicant had instructed them to appeal, enclosing a copy of the Notice of Appeal and asking them to sign the consent and return it. On 24 December 1997 the respondent's solicitors replied that they were taking instructions from the respondent and would write again shortly. Thereafter nothing was done by either party until on 22 July 1997 the applicant's solicitors wrote to the respondent's solicitors expressing surprise that they had received no further communication from them and asking them to sign and return the consent. The respondent's solicitors did not do so and the applicant's solicitors took no further action in the matter until they took out their summons on 23 September 1998 applying for leave to appeal. Mr Smith's explanation of that delay is that, embarrassed by what he regarded as the failure of the respondent's solicitors to honour their undertakings, he "allowed that to magnify the usual work pressures" and did not "follow up" as he should have done.

There is no copy of the notice of appeal sent to the respondent's solicitors on 20 December 1996 but, if it was in substantially the same terms as that exhibited to Mr Smith's affidavit, it was, in my view, because of the basis on which the undertaking was given, as referred to in the passage set out above from the applicant's solicitors' letter, not reasonable to expect them to honour it. I consider that Mr Smith has not given a reasonable explanation of his failure to take any action between May 1997 and September 1998. I have described above the explanation given by Mr Smith of the delay up to May 1997 as not wholly satisfactory. I have taken that view because the delay between December 1996 and May 1997 was not explained at all and because it appears likely that Mr Smith was placing on the respondent's solicitors' undertaking a reliance which he was not entitled to place on it.

In all the circumstances, therefore, I have come to the conclusion that the delay has been excessive and inordinate. Both for the reasons stated above and from perusal of Byrne J.'s judgment I have considerable doubt whether the grounds of the intended appeal have any merit.

Accordingly I dismiss the application for extension of time to appeal. The applicant is to pay the respondent's costs of the application which I fix at \$200.



I. R. Thompson
 Justice I. R. Thompson
 Justice of Appeal

Solicitors:

Messrs. Munro Leys and Company, Suva for the Applicant
 Messrs. Wm Scott Grahame and Company, Suva for the Respondent