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

CIVIL APPEAL NO. ABU0030 OF 2002
(High Court, Suva Civil Action No. HBC183 of 2001)

IN CHAMBERS

BETWEEN:

1) BAHADUR ALI
f/n Jamal-Ud-Din of Labasa,
Company Director

2) MUKTAR ALI
f/n Bahadur Ali of Labasa,
Company Director

3) NIWAZ ALI
f/n Bahadur Ali formerly of
Labasa but now of Brisbane,
Australia, Company Director

Appellants/Applicants

AND:

1) ILAITIA BOILA and CHIRK YAM
as Receivers & Managers for
Valebasoga Tropikboards Limited

2) FIJI DEVELOPMENT BANK
of 360 Victoria Parade, Suva in Fiji

3) MERCHANT BANK OF FIJI having
its registered office at Suva

Respondents

Mr W. Archibald for the Appellants/Applicants
Mr J. Apted for the 1st and 3rd Respondents
Mr D. Sharma for the 2nd Respondent

Date of Hearing: Tuesday, 20th August, 2002
Date of Decision: Thursday, 5th September, 2002

DECISION

For the purposes of this Decision I have adopted the description of the parties, as set out in the submissions of the Second Respondent, as follows:-

"[a]	*Bahadur Ali, Mukthar Ali and Niwaz Ali*	-	*"the Directors"*
[b]	*Ilaitia Boila and Chirk Yam*	-	*"the Receivers"*
[c]	*Fiji Development Bank*	-	*"the Bank"*
[d]	*Bahadur Ali*	-	*"Ali"*
[e]	*Valebasoga Tropkboards Limited*	-	*"VTL"* "

The Directors are the Applicants. The Receivers are the first Respondents. The Bank is the Second Respondent.

The Directors, by Notice of Motion filed on 26th of June 2002 seek leave to appeal to this Court from an Order of the High Court made on the 2nd of May 2001 granting the Receivers and the Bank certain injunctive reliefs. They also seek leave to appeal from a decision of the High Court given on the 2nd of November 2001 refusing to revoke the appointment of VTL's Receivers, and to require them to hand over the management of VTL to Ali, and to dissolve the Order made on 2nd of May 2001. If such leave is granted, then they ask that the time for filing Notice of Appeal, as prescribed by Rule 16 of the Court of Appeal Rules, be extended for a period of twenty-one (21) days, from the date of granting such leave.

In my view, the application for leave to appeal is misconceived, and can be disposed of quickly. No leave is required to appeal from either the Order made on the 2nd of May 2001, or the judgment given by Pathik J. on the 2nd of November 2001. In respect of both, the Directors have an unfettered right of appeal. Although generally leave is necessary, in order to appeal interlocutory orders made by the High Court, no

such leave is necessary where an injunction or the appointment of a receiver is granted or refused. The first Order of 2nd May 2001 is an Order granting injunctive reliefs. The second Order is a refusal to revoke the appointment of receivers and to revert the management of the affairs of VTL to the Directors. (See Section 12(2)(f)(ii) of the Court of Appeal Act.) It is now common ground, that leave is not necessary, and therefore there is no need to dwell on the issue any further.

The only application that I am required to deal with, is the application for extension of time within which to appeal. Before dealing with this issue, it is essential to briefly set out the facts leading up to this application:

Between July 1993 and May 2001 the Bank made various loans to VTL. As at 1st of May 2001 the total debt stood in excess of nine (9) million dollars. These loans were secured by a mortgage over VTL's Crown Lease, and a debenture by way of a charge over its existing and future assets. The monies secured under the debenture was payable on demand. VTL was in default of its repayment obligations under the loan agreements, and on the 7th of March 2001, the Bank demanded payment of the sum of $9,703,904.91 together with interest at the rate of 10.5% per annum from 1st March 2001 until full payment.

VTL failed to pay the amount demanded, and the Bank appointed the Receivers on the 1st of May 2001. Neither VTL nor Ali have offered to pay the total debt, to the Bank or into Court.

Following upon their appointment the Receivers attempted to take charge of VTL's assets including its premises at Nayaca in Labasa, but were prevented from doing so by the Directors or their servants and agents. As a result the Receivers and the Bank applied to the High Court for certain injunctive reliefs. On an ex-parte application, on the 2nd of May 2001 Pathik J. made the following Orders:-

> *"(a) That the Directors, their servants and/or agents do forthwith hand over to the Receivers' and their agents or servants possession and control of the business and property of VTL at Nayaca Subdivision, Labasa and at Laucala Beach Estate in Suva.*
>
> *(b) That the Directors are by themselves and/or by or through their servants and/or agents restrained from interfering in any way with the Receivers' rights and obligations as Receivers and Managers' to manage, control and operate the VTL's business and assets.*
>
> *(c) That the Directors are by themselves and/or by or through their servants and/or agents restrained from removing, transferring, disposing off or selling any of the stock, products, assets, chattels, documentary records, invoices or other items presently on the premises of VTL at Labasa or in Suva."*

The Order was sealed on the 2nd of May 2001. The Order was subsequently amended and the Police at Labasa were ordered to assist the Receivers secure possession of VTL's premises and assets.

On the 11th of May 2001, the Directors filed a Notice of Motion to Stay the Order made on 2nd of May 2001, and a further Summons on 16th of May 2001 seeking the following Orders:-

"(a) That the Receivers and the Bank be restrained from acting pursuant to the Appointment of Receivers made the 1st day of May 2001 and that all proceedings in respect of the said appointment be stayed until the substantive hearing of the action herein.

(b) The Receivers and the Bank and each of them, their employees, servants and agents be restrained from locking the Directors out of the premises of VTL at Labasa and harassing and interfering with the Directors' business operations and that the land property and business of VTL be returned to the Directors and VTL until the substantive hearing of the action."

The two applications by the Directors, and an application by the Receivers and the Bank for an extension of the injunction granted on the 2nd of May 2001 came up for hearing before Pathik J. on the 18th of May 2001 . The Receivers and the Bank objected to the Directors' applications on the ground that they had no locus standi to bring the applications, and reliance was placed on the authority of Deangrove Pty Ltd (Rec & Mgrs. Aptd.) v Commonwealth Bank of Australia [2001] FCA 173 (6th March 2001). It was stated on the authority of that case, that the Directors could not bring the application in their name, that the application had to be made in VTL's name, that the Directors had to secure leave of the Receivers to do so, and if leave was refused leave of the Court had to be obtained, and that in order to secure such leave the Directors had to provide sufficient indemnity to the Court. It is obvious from the record of proceedings for 18th of May 2001 that great deal of the discussions centered around Deangrove and the Directors locus standi. The offshoot, was that the Directors, or at least Counsel representing them, decided not to proceed with the application. Furthermore the opportunity to challenge the basis upon which the injunction was granted was not taken. As Mr Apted correctly pointed out Deangrove did not prevent the Directors from defending the Action and challenging the validity of the debenture under which the receivers were appointed or the evidentiary material upon which the injunctive reliefs were granted. Pathik J. then extended the interim injunction granted on the 2nd of May 2001 until further Order of the High Court.

The Order extending the injunction was sealed on the 1st of June 2001. On the 6th of July 2001, Ali filed a fresh Notice of Motion seeking the following Orders:-

(a) An Order that the appointment of the Receivers be revoked and management of VTL be handed back to Ali.

(b) An Order that all injunction orders against Ali be dissolved.

Various affidavits in support and in opposition to the Directors' applications were filed, but it is not necessary to refer to them for present purposes. It is not clear when the application was heard, indeed there may not have been a hearing, the parties content to rely on their respective written submissions. In any event, Pathik J. gave his decision on the 2nd of November 2002, dismissing Ali's applications. The Order was sealed on 14th November 2001.

The Order made on the 2nd of May 2001 was sealed on the same day. The Order was clearly interlocutory, and time for appeal began to run from that date.

The Order resulting from the decision of Pathik J. on the 2nd of November 2002 is also interlocutory and the Order was sealed on the 14th of December 2001, so that time for appeal began to run from that date. Rule 16 of the Court of Appeal Rules states:-

> *"Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected, that is to say-*
>
> *(a) in the case of an appeal from an interlocutory order, 21 days;*
>
> *(b) in any other case, 6 weeks."*

The intended appeal in the case of the Order sealed on the 2nd of May 2001 is almost 14 months out of time, and in the case of the Order sealed on the 14th of December 2001 almost 8 months out of time.

This Court has the power to extend the time for appealing. Section 20(1)(b) of the Court of Appeal Act (as amended) provides as follows:-

"20.—(1) A judge of the Court may exercise the following powers of the Court-

(a) .....

(b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;"

Section 17 of the Court of Appeal Act provides:-

" Discretionary power of the Court of Appeal

17. Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just."

The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles (see Hart v Air Pacific Limited Civil Appeal No. 23 of 1983). The onus is on the Appellants to satisfy the Court, that in the circumstances, justice of the case requires that they be given the opportunity to attack the Order made by Pathik J., on the 2nd of May 2001, and the judgment given on the 2nd of November 2001. The following factors are normally taken into account in deciding whether to grant an extension of time:-

1. The length of the delay.
2. The reasons for the delay.

3. The chances of the appeal succeeding if time is extended.
4. Prejudice to the Respondent.

See C.M.Van Stillevoldt BV v El Carrriers Inc. [1983] 1 W.L.R 207at 212.

The length of delay in this case is almost 14 months and 8 months, respectively. That is substantial delay. Mr Archibold for the Directors does not dispute that the delay is substantial, nonetheless, he says in the interests of justice, leave be given. The general rule is that, the rules of Court must be obeyed. As stated by the Privy Council in Ratnam v Kumarasamy (1964) 3 All E.R. 933 at p.935 - "The purpose of the rules is to provide a timetable for the conduct of litigation". When an intending appellant seeks extension of time, he must give acceptable reasons for the delay. On 26th June 2002 Ali filed an affidavit in support of the application for extension of time. Ali does not offer any reasons for the delay. It is inescapable, that no reasons or excuses are put forward, because none exist.

Mr Archibald told the Court, from the Bar, that an appeal was not lodged in time, because of the conflicting and confusing advice that the Directors were getting from their numerous legal advisers at the time. Mr Archibald was instructed later, when it was decided to pursue an appeal. There is a suggestion in Ali's affidavit that the decision not to proceed with his application of 16th May 2001, was made because of the advice that Deangrove prevented the Directors from pursuing it. Mr Archibald, now says that Deangrove (supra) did not prevent the Director from challenging the basis upon which the Receivers were appointed, and that he wants this issue ventilated on appeal.

The crux of the matter is that the application was not pursued as a matter of choice - if that choice was made on bad advice, then the Directors remedies may lie elsewhere. It is also noted, that the application made on the 6th of July 2001, seeking,

inter alia, revocation of the receiving Order, proceeded on the basis that the Order had been properly made. There was no challenge to the Order itself, something that the Directors now seek to do on appeal. The revocation was sought on the basis of alleged subsequent events.

On the material before me, I do not find that the delay is explained. I cannot accept that the fact that the Directors had several legal advisers giving conflicting and confusing advice an acceptable reason for the delay. Mr Apted for the Receivers and the Bank submitted, that in any event, the appeal is misconceived. He submitted that if the Directors were aggrieved by the ex parte Order, the proper remedy was for them to apply to the High Court under O.32 r.6 to have it set aside or to ask the Court to set it aside on its return date. At paragraph 59/1/3 of the 1999 edition of the Supreme Court Practice, it states -

> *"(1) ...*
> *(2) An application to discharge or vary an order made ex parte. Where an order has been made ex parte in the court below the appropriate procedure, if the other party wishes to contest it, is to apply to the court below to set it aside, or vary its terms. Although the Court of Appeal has jurisdiction to hear an appeal against an ex parte order, it will not normally do so (WEA Records v Visions Channel 4 Ltd [1983] 1 W.L.R. 721; [1983] 2 All E.R. 589). The same applies even where the intending appellant attended the hearing of the ex parte application; for the practice of the Court of Appeal in relation to appeals against order made at "opposed ex parte" hearings see Hunter & Partners v Welling & Partners ((1987) 131 S.J. 75; (1986) The Times, October 16, CA) ..."*

In WEA Records Ltd v Visions Channel 4 Ltd [1983] 2 All E.R. 589 Sir John Donaldson at p.593 said:-

> *"f .... Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex*

parte and is reflected in RSC Ord 32, r 6. ....

As I have said, ex parte orders are essentially provisional
h in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself
j and in no way feels inhibited from discharging or varying his original order."

The Appellants now complain that the Receivers and the Bank did not disclose all the relevant facts of the case to Pathik J. in support of the applications for interim injunction. But the Appellants had all the opportunity to apply to the High Court in this proceedings, to have the injunction discharged on that basis, but elected not to do so. This is a factor that has to be weighed in the exercise of the discretion.

As to the merits of the proposed appeal arguments centered around two issues. The first is raised at paragraph 19 of Ali's affidavit filed, in support of the application. Ali says that the deed of debenture is "null and void". The argument is that the debenture is a charge over VTL's assets, including State Lease No. 12023. Lease 12023 is a protected lease, and any charge over the lease should have the prior written consent of the Director of Lands. Because such consent was not obtained, and the debenture endorsed, it is null and void, and subsequent appointment of Receivers under it illegal (Section 13 argument). This argument is being raised for the first time. It was not raised before Pathik J., either on the 18th of May 2001 when the interim injunction was extended, nor was it raised on the hearing of the 6th of July application.

Section 13 of the Crown Lands Act reads as follows:-

"Whenever in any lease under this Act there has been inserted the following clause:

"This lease is a protected lease under the provisions of the Crown Lands Act" (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgate or other alienation or dealing effected without such consent shall be null and void." "

The Receivers and the Bank say that they have not gone into possession of the lease. The Receivers have gone into possession as agents of VTL, and VTL remains in possession. Furthermore, clause 2 of the Lease requires written consent of the Director to transfers, subletting, mortgaging, assigning or parting with possession and although the Director of Lands is empowered to by Section 13, to protect the lease from "charges" he has not done so. In my view, there is merit in the submission.

In any event, I agree that the evidence is not conclusive that the consent of the Director of Lands was <u>not</u> obtained. In this context, I need to mention one other Action, that is currently before the High Court, namely Action No. 28 of 2002. In that Action Ali's Civil Engineering Ltd and VTL are the Plaintiffs, the Receivers and the Bank are the Defendants. In that case the Section 13 argument has been raised and the validity of the indenture put in issue. It can of course also be raised in the present Action by way of counterclaim. I was told from the Bar that this has not been done, and an application to amend the pleadings may still be open to the Directors. These are relevant matters in the exercise of the discretionary powers of this Court.

The second issue arises from the November decision. As stated earlier Pathik J. declined to make the interlocutory injunctive order sought by the Directors, and dissolve those that had been obtained by the Receivers and the Bank. The learned Judge did so, because he found that the Directors did not have the locus standi to seek revocation, as they were not VTL, and had no authority from the Receivers and the Bank to make such applications. In reaching that conclusion Pathik J. followed the case of Deangrove. The Directors propose to argue that the learned Judge erred in doing so because, Deangrove was decided under legislation peculiar to Australia. Mr Apted for the Receivers and the Bank says that both the November decision and Deangrove, are based on and reflective of the general common law principles of the law of companies. In addition to relying on Deangrove Pathik J. found as a fact that Ali was only one of the Directors and a minority shareholder and provided "no sworn evidence that he is authorized by the Board" or the shareholders to make the application of 6th July.

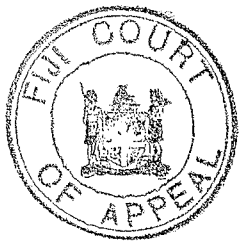
I am not persuaded that either the Section 13 argument or the Deangrove argument raise grounds that are so meritorious as to warrant leave to appeal out of time. I am not satisfied that the Directors should have an opportunity to attack the 2nd of May 2001 Order, or the 2nd of November 2001 decision.

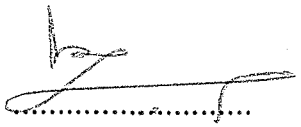
The Receivers were appointed on the 1st of May 2001, and soon thereafter went into possession of the assets of VTL. They are now running the affairs of the Company. More than a year has elapsed since, and they have conducted their duties on the basis of the ex parte injunction granted on the 2nd of May 2001. It will be prejudicial to them and to the Bank, to permit a challenge to that order on appeal at this late stage.

The delay in this case is substantial. No plausible or acceptable reasons have been given for the delay. The Directors failed to take the opportunity to ask Pathik J. to review the Order made on an ex parte application as they were clearly entitled to. There was no challenge to the appointment of the Receivers in the 6th of July 2001 application mounted by the Directors, indeed, it proceeded on the basis that the appointment was proper. Section 13 issue, is being raised for the first time and was not canvassed before Pathik J. For all these

reasons I am satisfied that the justice of the present case does not require that the Directors be given an opportunity to attack the ex parte Order made on the 2nd of May 2001 (and subsequently extended) or the decision of 2nd November 2001.

The application for extension of time is therefore refused. The Respondents are entitled to costs which I fix at $750.





Jai Ram Reddy
President