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

CIVIL APPEAL NO.ABU0001 OF 2001S
(High Court Civil Action No. HBC 146 of 2000)

BETWEEN:

AIR PACIFIC LIMITED

Appellant
(Original defendant)

AND:

LICE ELENIVULA SAUMI

Respondent
(Original Plaintiff)

Coram: Eichelbaum JA in Chambers

Hearing: 18 February 2002

Counsel: Mr R. Smith and Ms. G. Phillips for the Defendant
Mr D. Singh for the Plaintiff

Date of Judgment: 19 February 2002

JUDGMENT(SUMMONS TO EXTEND TIME TO APPEAL, AND FOR STAY)

I will refer to the parties as plaintiff and defendant. Before the court are applications by the defendant for extension of time for filing a notice of appeal, and an application for stay. Both are opposed by the plaintiff.

On 7th November 2001 the High Court delivered judgment in favour of the plaintiff ordering the defendant to pay $457, 690.50. Questions of interest and costs remained to be decided, and were the subject of communications between Counsel.

In the period following delivery of judgment the defendant and its solicitors were reviewing the judgment to decide whether to take an appeal. The solicitors caused

searches to be made in the High Court Registry to check whether a formal judgment had been sealed. In fact the order was filed on 9 November, and described in the cause book as "Judgment Order." It was sealed on 12 November. I infer the search clerk must have informed the principal in charge of the case that judgment had not been sealed. One might ask whether the description "judgment order" was as clear as it could have been, whether there should have been a more explicit entry reflecting the formal sealing of the judgment three days later, and, perhaps most pertinently, whether there was an element of carelessness on the part of the solicitors' clerk in not looking into the significance of the "judgment order." Although counsel for the plaintiff did not make any special feature of the last aspect it is in fact difficult to escape the conclusion that the entry "judgment order" ought to have alerted the defendant's solicitors to the likelihood that at the very least, the plaintiff's solicitors were trying to seal the judgment.

If in a situation such as this there is some element of default on the part of the defendant's solicitors, the defendant itself may have to suffer the consequences. However, it is plain that as late as 10 December the defendant believed time had not commenced to run, since on that date the principal of the defendant's solicitors in charge of the file, relying no doubt on advice from the search clerk, explicitly advised the defendant that that was the position. Defendant's solicitors continued to believe that was the case until they received a letter from plaintiff's solicitors on 7 January 2002, saying the time for appeal had expired and requesting payment of the judgment. On that day they also served a copy of the formal judgment as sealed.

Although the point has been made in previous judgments it is worth noting

again that a deficiency in the court rules is the absence of a provision requiring service of a copy of the sealed formal judgment as soon as it has been sealed. If there was such a provision the application now before the court, and the considerable quantity of paper it has generated, would have been avoided.

On 8 January the defendant's solicitors advised the plaintiff's solicitors that they had instructions to appeal. On 9 January the defendant's solicitors attempted to file a notice of appeal but the registry rejected it as out of time. There are no grounds for criticising the promptness of the steps taken by the defendant's solicitors subsequently, in filing and advancing the application for extension of time. It is reasonable to regard the defendant's delay as ending on 8 January. Time for appeal having expired on 21 December, the delay was 17 days.

An application of this kind is entirely within the court's discretion, which has to be exercised according to the facts of the case. As a useful guide in the consideration of the application I take the headings contained in *C.M. Van Stillevoldt BV v. El Carriers Inc. [1983] 1 W.L.R. 207; [1983] 1 All ER 699.* To some degree I have already dealt with the first factor, the extent of the delay, and also the second, the reason. In short the reason was that owing to some slip, lack of experience or absence of accumen on the part of the clerk, defendant's solicitors and through them, the defendant, genuinely believed that that the time for appeal had not yet run, when in fact it had. It was an important case, the defendant and its advisers clearly intended to give consideration to an appeal from the outset, and the delay was accidental, not deliberate. I consider the delay has been explained sufficiently.

As to prejudice, taking into account the time that has elapsed until today, the progress of the appeal has been delayed by 2 months. The state of the backlog in the Court of Appeal is such that one could normally expect a delay of at least some months before the appeal could be allocated a fixture. It is possible, although not certain, that a lapse of 2 months would not cause any delay in the hearing of the appeal. At most, it would result in the appeal being heard one session later than otherwise would be the case. While I appreciate that from the plaintiff's point of view that is a significant consideration, it is not sufficient to be decisive against this application.

The final matter is whether the defendant has an arguable case. The plaintiff's husband met his death while travelling to work on 24 July 1999. The clause in issue in the collective agreement between plaintiff's husband and the defendant read:

> ***18.2 Death Cover***
>
> ***18.2.1*** ***The Company shall provide a death cover insurance for each pilot killed in the course of his duty with the Company or in the course of his employment or while he is based, slipping(sic) or travelling overseas in the course of his employment. However this death cover shall not apply if injury or death is attributable to misconduct or death resulting from a self-inflicted injury.***
>
> ***18.2.2*** ***Such death cover shall be on a 'door to door' basis and shall be in accordance with the following table.....***

The Judge held that the plaintiff's husband was not in the course of his duty or of his employment in terms of clause 18.2.1 but that the circumstances came within the terms "door to door" under clause 18.2.2. It does not appear there is any case law directly

57

assisting with the interpretation of that phrase.

It is not my function to express any opinion as to the merits of the decision reached by the High Court. The defendant has to satisfy me there is a tenable argument that the judgment is wrong. "Door to door" is not a recognised legal expression, nor, as I have said, does it appear to have antecedents in case law. Identification of the "doors" is left to implication, although of course the plaintiff may be correct in suggesting that the broad intention of the words is not difficult to discern. However that may be, I am satisfied there are sufficient arguments to be made on behalf of the defendant to enable me to regard the onus of showing a tenable argument as discharged.

Standing back and looking at the application in its totality, I am mindful that the time has expired by a distinct margin, and of the onus firmly on the defendant to establish sufficient grounds for an extension. I am satisfied that the defendant has discharged that onus, and indeed that it would be unjust, having regard to all the circumstances, including the amount involved and the significance of the issue, not to allow the defendant to proceed with an appeal.

As to the application for stay, I accept that a successful litigant should not lightly be deprived of the fruits of success. However, in the absence of a stay an appeal right may be rendered nugatory. In circumstances such as the present, the Court needs to balance those consideration, and see where the balance of convenience lies. Clearly the plaintiff is a person of substance. She has deposed she owns an uncumbered freehold piece of land containing a modern house. The property is situated in a high class

residential area and the plaintiff deposes is worth over $250,000. Counsel for the defendant did not seek to cast doubt on this evidence. The plaintiff has 3 daughters aged 19, 17 and16. She has stated that these are the only beneficiaries under her husband's estate, apart from herself. Of course her action was brought as administratrix of the estate.

The amount of the judgment is a good deal in excess of the plaintiff's self valuation of her principal asset. In my judgment it would be unreasonable to place the defendant in the position of paying over the judgment in full at this stage. It would expose the defendant to the risk that to an extent the appeal would be rendered nugatory, in the event the defendant was successful.

At the same time I am conscious that more than 2 1/2 years have elapsed since the plaintiff's husband met his death, and that she has 3 daughters at an expensive stage of their lives.

Although I consider the defendant is entitled to a stay, I propose to make this subject to the condition that the defendant makes an interim payment of $100,000 on account of the judgment. The interim payment, in turn, will be subject to the condition that the plaintiff provide security for the repayment of that sum in the event that the judgment of the High Court is reversed. I will set out the formal order more fully below. I record that Counsel had the opportunity to consult their clients regarding the possibility of a condition on these lines.

59

Result

1. On the application for leave the formal Order is that the time allowed for filing and serving a notice of appeal is extended to and including 22 February 2002.

2.1 On the application for stay the formal Order is that execution of the judgment of the High Court delivered on 7 November 2001 be stayed pending a decision of the Court of Appeal on any appeal conducted pursuant to a notice of appeal lodged pursuant to the Order under (1).

2.2 Such Order for stay is conditional upon the defendant's consent (which has been given and is now recorded) to the Order under 2.3

2.3 In the event that the plaintiff shall deliver to Munro Leys as solicitors to the defendant the plaintiff's duplicate copy of CT 17087 and a mortgage in the form of the draft filed in Court executed by the plaintiff in a manner which would render the same registerable under the Land Transfer Act, the defendant shall forthwith pay to the plaintiff the sum of $100,000 on account of the defendant's current liability to the plaintiff under the judgment delivered on 7 November 2001 by the High Court in Action No.HBC 146 of 2000.

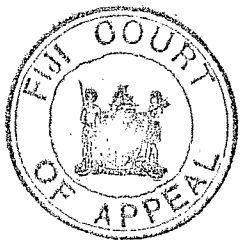
60

2.4 Should the plaintiff not fulfill the conditions in 2.3 on or before 19 March 2002 (or such further time as this Court may allow) the Order for stay will be unconditional.

2.5 Leave to apply.

2.6 As to costs, most of the submissions related to the application for leave. Since it was necessary for the defendant to seek an indulgence I order the defendant to pay costs to the plaintiff of $750. There will be no order for costs on the application for stay.

Dated at Suva 19 February 2002.



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Thomas Eichelbaum
Justice of Appeal