

- [2] The law has for centuries frowned on undue delays in prosecuting actions. There is an old maxim VIGILANTIBUS, NON DORMIENTIBUS, JURA SUBVENIUNT. Translated that means that the laws assist those who are vigilant, not those who sleep on their rights. This maxim goes back at least to the latter part of the 16th century and is referred to in the 1605 case of Sheffield v. Ratcliffe, Hob. 334 at p.347.
- [3] In this case I have no doubt that the Appellant has slept on his rights and yet now, over nine years since he commenced this action for wrongful dismissal in the High Court, it has still not been heard.
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- [4] In the decision of Winter J. from which the Appellant seeks leave to appeal the learned Judge set out at page two of his decision a chronology of events which illustrates vividly the delays which have occurred in the prosecution of this action.
- [5] The Appellant was dismissed from his employment with the Respondent on the 7th of March 1995 and yet did not issue proceedings until the 2nd of December 1997. That of course was within the time limit for the institution of proceedings. As Winter J. said at page 5 of his decision ***“the curial history demonstrates that the average time between file events is six months. There are ten gaps of inactivity of six months or more. The longest period of inactivity is 15 months. No excuse is offered for the delay. If the Appellant was***

genuine in his desire to have his case litigated he has ample opportunity. If he was dissatisfied with the delays of the three lawyers whom he consulted, than his remedy was simple: consult another lawyer or lawyers if necessary. There are numerous lawyers in Suva alone who could have undertaken the Appellant's case but he chose to remain with three for varying periods and then blames them for the delay in getting his case to Court. This explanation is unacceptable. He cannot claim of any failure by this Court to help him in getting his case before the High Court".

- [6] On the 4th of May 2006 his appeal against the decision of Winter J. was deemed abandoned for non-compliance with Rule 17(1) of the Rules of this Court.
- [7] Over three months later on the 7th of July 2006 he filed a summons for leave to enlarge time for appeal and this was heard by Ward P. on the 8th of August 2006 who ordered that an application should be made to the Full Court in accordance with Rule 17(3).
- [8] One would have expected that having been granted further time by the Court he would make his application soon after President Ward's decision but he did not. Again delaying, on the 5th of February 2007 the Appellant filed a Notice of Intention to act in person and a fresh application for leave to appeal out of time.

- [9] On the 3rd of May 2007 Ward P. directed the Appellant to make his application to the Full Court as ordered on the 8th of August 2006. He also made an order for costs in favour of the Respondent in the sum of \$200.00 which the Court has been informed has not yet been paid.
- [10] The case law on this question was set out clearly in the judgment of Pathik J. A. in Civil Appeal No. ABUOO51 of 1994S - Ist Deo Maharaj v. Burns Philip (SS) Co. Ltd. I shall not repeat it here except to quote from the judgment of Marsack J. A. in Latchmi v. Moti & Ors. in 10 F.L.R. 138 at p.145 when he said ***“in deciding where the Justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the Respondent are considered equally with those of the applicant”***.
- [11] In my experience the rights of Respondents in applications of this nature are too often overlooked by Appellants. They should not be. This Court has said time and again that its rules are there to be obeyed. Litigants who choose not to, do so at their peril. In my judgment this Court has been more than sympathetic to the Appellant and should give him no further leniency. For these reasons I dismiss his application for leave to appeal out of time.

Pathik J.A. and Mataitoga J.A.

Introduction

- [1] This is an appeal by the appellant under the Court of Appeal Rules for leave to **appeal out of time** from the judgment of the High Court delivered by Winter J on 3 March 2006 dismissing the plaintiff's (appellant's) claim for want of prosecution with costs in Civil Action No. 527 of 1997.

Background to the Application

- [2] By the said action the appellant instituted proceedings against the Respondent for unlawful dismissal after he was allegedly dismissed on 7 March 1995.

- [3] The chronology of events is set out in His Lordship's Decision on striking out application which clearly demonstrates that this case has, as he says, '*a dilatory curial history*'.

[4] **The Chronology**

After the filing of the Writ of Summons and the Statement of Claim on 2 December 1997, the Pre-trial Conference was applied for on 11 August 1998. Then there was change of solicitors on 10.9.98 and again on 9.3.99; Minutes of Pre-trial

Conference filed on 14.6.99; copy pleadings filed 6.8.99; amended writ of summons on 7.2.00; plaintiff intended to act in person on 1.11.00; filed amended writ on 6.2.01; application for summary judgment on 27.9.01; change of solicitors on 1.4.03; again change of solicitors on 27.7.05.

The Decision on the Strike Out application was given on 3.3.06; Notice of Appeal filed by counsel Mr. Seru on 27.4.06; appeal deemed abandoned on 4.5.06 for non compliance with Court of Appeal Rule 17(1); summons for leave to enlarge time for Appeal filed on 7.7.06. On **8.8.06** Justice Ward ordered that application be made to full Court in accordance with Rule 17(3); on **5.2.07** appellant filed Notice of Intention to act in person and files a fresh application to leave to appeal out of time. Finally, on **3.5.07** Justice Ward directed that appellant make application to Full Court as ordered on 8 August 2006 and awarded costs against him in the sum of \$200.00.

Consideration of Appeal

- [5] The appeal is opposed by the respondent.
- [6] The appellant in his written submission on appeal states that *"the blame for the delay lies squarely on all the Court Officers [the judge, the Respondent/Defendant Solicitor, and the Appellant/Plaintiff's Solicitor] involved in proceedings as they turned a blind eye to such a breach of the law, which was the*

breach of rules of natural justice, and the apparent conflict of interest, and they went ahead and struck out the Civil Action HBC 527/97".

[7] Further the reasons given by the appellant are that he '*refutes the grounds*' of the decision to strike out. He says that he has '*a very good chance of success*'. He also says that his '*dismissal was a fraud*'.

[8] The above are in short the reasons giving rise to appeal out of time.

[9] The reasons given for the length to delay to appeal are, it is quite obvious from the chronology of events, inadequate and unacceptable to the Court.

[10] The appellant has been filing documents and making applications as and when he wished in complete disregard of the Rules of the Court and Court Orders. This approach by the appellant to his problem about his alleged dismissal will not assist him.

The High Court has already struck out his action for the reasons it has given with which this Court agrees.

Rules of the Court

[11] The Rules of the Court are to be obeyed as stated as follows by the Privy Council in Ratnam v Cumarasamy 1964 3 All E.R 933 at 935:

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation” (underlining mine for emphasis).

Similar statements as above were made by this Court in Kenneth Hart v Air Pacific Ltd Civ. App. 23/83 and Tevita Fa v Tradewinds Marine Civ. App. ABU 40/94 as in all such cases there is need for satisfactory explanation for the delay before the Court will grant leave.

[12] Here the appellant failed to comply with the Court of Appeal Rules. His appeal was deemed abandoned for non-compliance with Rule 17(1) followed by failure to comply with Rule 17(2). Then under R17(3) he could not proceed without leave of the Court of Appeal.

Discretionary Power

[13] The grant or refusal of leave out of time is a discretionary matter for the Court and this has to be exercised judiciously.

[14] On this Lord Greene M.R in Gatti v Shoosmith (1939) 3 All E.R. 916 at 919 said:

“The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised.”

[15] In Re Manchester Economic Building Society (1883) 24 Ch.D 488 at 497, Brett M.R said:

“I know of no rule other than this; that the Court has power to give the special leave and exercising its judicial discretion is bound to give the special leave if justice requires that leave should be given.”

[16] In the exercise of discretion the factors which are normally taken into account in deciding whether to grant an extension of time are: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the respondent if the application is granted (vide CM Van Stillevoeldt BV v EL Carriers Inc (1983) 1 WLR 207 at 212;

Norwich and Peterborough Building Society v Steed (1991)

2 AER 880 C.A.

- [17] How the discretion is to be exercised has been well stated by Lord Greene MR in **Gatti v Shoosmith** (supra) as follows:

“the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say ‘may be’ because it is not to be thought that it will necessarily be exercised in every set of facts. ~~Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.~~

The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised.”
(underlining mine for emphasis)

- [18] The Court on the application before it is not “concerned here with any question at all as to the merits of this case or the

probability of success or otherwise" (**Mackinnon & Finlay LJJ**) in **Shoosmith**, supra.

[19] The Court, bearing in mind the principles stated in the decided cases, in the exercise of its discretion, does not consider this case to be a case involving just a few days so that leave to appeal out of time could be allowed.

Delay Filing Appeal

[20] Looking at the facts and circumstances of this case, there have been unexplained delay in applying out of time.

[21] Apart from blaming others for the delay he is holding his solicitors responsible for his present plight. He has changed his solicitors so many times and then decided to act on his own and even then he failed to comply with Justice Ward's Order and completely disregarded the Court of Appeal Rules.

Putting the blame on solicitors will not help the applicant.

[22] In **Jaswant Singh s/o Gopal Singh and Peter Francis s/o Francis Appana** (Action No. 57/73 FCA), due to oversight in instructing solicitors due to Appellant's commitment in Australia, the application was refused where the delay was four weeks.

[23] There **Marsack JA** said that he 'can find no grounds for holding that good reasons for the delay has been shown' even when the Appellant's solicitor was engaged in a Supreme Court criminal trial at the relevant time for filing appeal, he did not think that "the granting of an extension of time is required in the interests of justice".

[24] To show how strict Courts are on 'time' I refer to **Tevita Fa t/a Tevita Fa & Associates and Tradewinds Marine Ltd and Oceanic Developers (Fiji) Ltd** (Civ. App. No. 40/94 FCA).

Conclusion

[25] In the outcome, bearing in mind the factors Courts consider in dealing with an application such as the present and the facts outlined hereabove, the appellant has no chances of succeeding in this appeal.

[26] The length of delay is too long and the reasons for delay are unacceptable.

[27] As far as the degree of prejudice is concerned the Respondent will be greatly prejudiced as stated by it if the application was granted after such a long delay even in the interests of justice. On this aspect I refer to the following passage from the judgment of this Court in **Kenneth John Hart** (supra) in refusing leave to appeal out of time:

“When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.”

[28] The following passage from the judgment of Richmond J in Avery v Public Service Appeal Board (No. 2) (1973) 2 NZLR 86 at 91 is apt and was approved by this Court in Hart (supra):

“Mr. O’Flynn pointed out that this was a case of a solicitor’s error resulting in a short period of delay after the expiration of the ordinary time for appealing. That delay, he said, had not prejudiced anybody. No doubt there may be many cases where this type of argument might prevail upon the Court to grant leave. Clearly however the Court is not restricted to such considerations. The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the

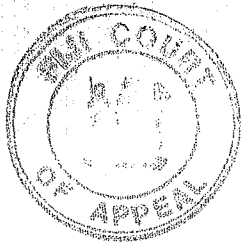
granting of leave would have on other persons involved.”

[29] The Court concludes with the following words of Lord Denning MR in Revici v Prentice Hall Incorporated & Others (1969 Q.B. D p.157 at p. 159):

“Nowadays we regard time very differently from the way they did in the 19th century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had three and a half months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more.”

[30] The appeal is for these reasons dismissed with costs of \$1000.00 to the respondent.

John E. Byrne
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Byrne JA



Pathik
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Pathik JA

Mataitoga
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Mataitoga JA

At Suva

7th September 2007