

IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV 0009 of 2018
[Court of Appeal No: ABU 80 of 2016]

BETWEEN: EXTREME BUSINESS SOLUTION FIJI LIMITED

Petitioner

AND: FORMSCAFF FIJI LIMITED

Respondent

Coram: Hon. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Justice Frank Stock, Judge of the Supreme Court

Counsel: Mr P Sharma for the petitioner
Mr N Lajendra for the Respondent

Date of Hearing: 11 April, 2019

Date of Judgment: 26 April, 2019

J U D G M E N T

Marsoof J

- [1] I have read in draft the judgment of Chandra, J and that of Stock, J and to my mind, the issue is whether the discretion of the High Court under Order 3 Rule 4(1) of the High Court Rules, 1988, has been properly exercised.
- [2] While Rules of Court are not to be taken lightly, it is significant that Order 3 Rule 4(1) confers on the Court a discretion to grant an extension of time "on such terms as it thinks just" even after the expiry of the period of time stipulated by the Rules on an order of Court.
- [3] I am therefore inclined to agree with the approach adopted by Stock, J in his judgment, and agree that special leave to appeal ought to be granted in this case, and the appeal allowed.
- [4] I am in agreement with the consequential orders proposed by him.

Chandra J

- [5] The Petitioner has by petition dated 6th July 2018 sought special leave to appeal to the Supreme Court from the judgment of the Court of Appeal dated 1 June 2018 dismissing its appeal.
- [6] The Petitioner has submitted that its appeal is a matter that is otherwise of substantial general interest to the administration of civil justice and has formulated the following grounds of appeal:

“1. *The Court of Appeal erred in holding that the learned High Court Judge dismissed your Petitioner’s appeal as a result of non-compliance by your petitioner of Order 59 Rule 17(1) of the High*

Court (Amendment) Rules 2006 since the learned High Court Judge stated at paragraph [23] of his Ruling delivered on 9th June 2016 that your Petitioner was still within time to comply with Order 59 Rule 17(1). The learned High Court Judge did not dismiss your Petitioner's appeal on 09th June 2018 as a result of non-compliance by your Petitioner of order 59 Rule 17(1) of the High Court (Amendment) Rules 2006.

2. *The Court of Appeal failed to give written consideration of your Petitioner's submissions that the learned High Court Judge erred on 22nd March 2016 when he failed to consider Order 3 Rule 4(1) and (2) of the High Court Rules 1988 and exercise his discretion to extend the time of service of the notice of appeal on the Respondent.*
3. *The learned High Court Judge erred when he relied on Order 59 Rule 10 of the High Court (Amendment) Rules 2006 to dismiss the Petitioner's appeal since Order 59 Rule 10(1) deals with an application to enlarge the time period for filing and serving a notice of appeal. That on 22nd March 2016 Your Petitioner had only sought an enlargement of time to serve the notice of appeal on the Respondent which notice had been filed on 16th March 2016 and issued by the High Court Civil Registry on 21st March 2016. That Order 59 Rule 10 does not specify any adverse consequences of non-compliance with Order 59 Rule 10.*
4. *The Court of Appeal failed to give written consideration of your Petitioner's submissions that the Respondent did not file a summons under Order 32 of the High Court Rules 1988 when on 22nd March 2016 it made an oral application to have the Petitioner's notice of appeal before the learned High Court Judge dismissed."*

Background

- [7] On 27th October 2015 the Acting Master of the High Court had made an order that the substituted winding up petition filed by the Respondent be granted and the Official Receiver be constituted as the Provisional Liquidator of the Petitioner.
- [8] The 21 day period for filing and serving of an appeal lapsed on 17 November 2015. The application for leave to appeal out of time/for enlargement of time to file and serve the

notice of Appeal was filed in court by the Petitioner on 16 December 2015 in the High Court. The Respondent filed an affidavit in opposition on 29 January 2016 and the Petitioner filed an affidavit in reply on 8 February 2016.

[9] On 9th February 2016 Counsel for the Petitioner and the Respondent were heard and they had also filed written submissions.

[10] On 9th March 2016, the learned High Court Judge gave his Ruling regarding the application of the Petitioner seeking enlargement of time to file the appeal and made the following orders having concluded that the Court considered it an appropriate case for granting leave:

1. *The application made by the Appellant for the enlargement of time to file and serve the Notice of Appeal is allowed.*
2. *The Appellant is hereby granted 7 days from today to file and serve the notice of appeal.*
3. *Costs of the application shall be costs in the appeal.*

[11] The Petitioner had served the notice of appeal on the Respondent on 21st March 2016.

[12] When the matter was mentioned in Court on 22nd March 2016, the Respondent had raised the following preliminary objections:

(a) That the Notice of Appeal was not served within the time required; and

(b) That the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date and that the Appellant has not complied with the requirements of Order 59 Rule 17 of the High Court Rules 1988.

[13] Counsel for both parties had made oral submissions regarding the preliminary objections and had also filed written submissions.

[14] On 9th June 2016 the learned High Court Judge gave his written Ruling dismissing the notice of appeal on the ground that the Petitioner failed to serve the notice of appeal on the Respondent within 7 days from 9th March 2016 as ordered by Court.

[15] In his Ruling the learned High Court Judge stated:

"[15] It is clear to this Court that the Appellant has in fact used a format for the Notice of Appeal which required the Registry to allocate a date on it. Having filed the Notice of Appeal in the said format, the Appellant cannot now blame the Registry for the delay or failure in serving the Notice of Appeal on the Respondent within the stipulated time frame. On 9 March 2016, this Court made specific directions that the Notice of Appeal should be filed and served 7 days from the 9 March 2016. This meant that it was incumbent on the Appellant to both file (in the Registry) and serve (on the Respondent) the notice of Appeal on or before 16 March 2016. However, in this instance the Appellant has failed to do so."

[16] The Petitioner had drawn the attention of the learned High Court Judge to Order 2 of the High Court Rules dealing with Effect of Non-Compliance of the Rules and the learned High Court Judge had dealt with that position as follows:

"[25] Even though the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date, Court could have acted under the provisions of Order 2 and treated that failure as an irregularity and not as one which would nullify the proceedings."

[26] However, in this case there is a more fundamental issue at hand. That is that the Notice of Appeal was not served on the Respondent within the time stipulated by Court. This is not a defect that could be cured in terms of Order 2 of the High Court Rules."

[17] On the invitation by the Petitioner for the exercise of the discretion of the Court, the learned High Court Judge had stated thus in his Ruling:

"[29] The Appellant submits that despite the fact that the Notice of Appeal has already been served, this Court can and ought to exercise its discretion and extend the time given to the Appellant to serve its Notice of Appeal on the Respondent. Court cannot agree with this submission. There is a specific provision in the High Court Rules."

namely Order 59 Rule 10, under which such applications for extension of time for filing and serving of Notice of Appeal has to be made, as was done by the Applicant earlier in these proceedings.

[18] The learned High Court Judge had concluded his Ruling as follows:

“[30] For all the aforesaid reasons, this Court upholds the first preliminary objection taken by the Respondent that the Appellant had failed to serve the Notice of Appeal on the Respondent within the time stipulated by this Court.”

[19] Thereupon the Petitioner appealed against the said Ruling of the learned High Court Judge to the Court of Appeal.

[20] The Court of Appeal heard the appeal of the Petitioner's appeal on 10th May 2018 and by judgment delivered on 1st June 2018 dismissed the appeal.

Consideration of the application for special leave to appeal

[21] The basis of the application of the Petitioner is the dismissal of the notice of appeal by the High Court on 9th June 2016. The Petitioner had failed to file an appeal within the stipulated time for filing an appeal against the order of the acting Master given on 25th October 2015 and had thereafter made an application seeking enlargement of time to file a notice of appeal before the High Court. The learned High Court Judge had made order on 9th March 2016 on the application of the Petitioner seeking enlargement of time (which was in terms of Order 59 Rule 10) as follows:

- “1. The application made by the Appellant for the enlargement of time to file and serve the Notice of Appeal is allowed;*
- 2. The Appellant is hereby granted 7 days (seven days) from today to file and serve the Notice of Appeal.*
- 3. Costs of the application shall be costs in the appeal.”*

- [22] In the course of making the said Ruling the learned High Court Judge had stated that there were grounds of merit in the appeal filed by the Petitioner. However, the notice of appeal had been dismissed by the learned High Court Judge as the Petitioner had failed to serve the notice of appeal within the time stipulated by Court (the 2nd order in his Ruling of 9th March 2016). The Petitioner's predicament has been that having failed to file an appeal against the order of the Acting Master within the stipulated time, and succeeding in its application for enlargement of time to file its notice of appeal, as the learned High Court Judge granted the application, failing to serve the notice of appeal on the Respondent within the time ordered by Court.
- [23] The Court of Appeal when considering the appeal of the Petitioner dealt with the position regarding the serving of the notice of appeal on the Respondent as ordered by the learned High Court Judge on 9th March 2016 and arrived at the conclusion that the notice of appeal had been served late. Although the High Court had concluded that the service was five days late, the Court of Appeal had considered it to be only three days late. However, the fact remained therefore that it was nevertheless served late and therefore there was a non-compliance of the order of the Court made on 9th March 2016.
- [24] The conclusion of the Court of Appeal after consideration of the relevant Orders and Rules regarding the procedure to be followed in filing applications for enlargement of time and notice of appeal was that the learned High Court Judge had not erred in making the order dated 9th June 2016.
- [25] In the 1st Ground of Appeal the Petitioner has taken up the position that the Court of Appeal erred in law in holding that the learned High Court Judge dismissed the petitioner's appeal as a result of non-compliance of Order 59 Rule 17(1) of the High Court Rules.
- [26] The Court of Appeal had referred to Order 59 Rule 17 (1) of the High Court Rules in the course of its judgment and referred to its mandatory effect and stated that the Court cannot use its discretion when the statutory provisions are mandated.

[27] Order 59 Rule 17(1) provides:

"17(1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service."

[28] In the instant case, the learned High Court Judge in his Ruling of 9th March 2016, referred to Order 59 Rule (17(1) as the second objection taken up by the Respondent was based on that Rule (Vide para9 above) and stated that the said objection which referred to the irregular form in which the notice had been filed and non compliance of Order 59 Rule 17(2) can be disregarded. It is clear therefore that the learned High Court Judge did not dismiss the notice of appeal based on Order 59 Rule 17.

[29] The Court of Appeal did not state that the High Court Judge dismissed the Petitioner's appeal for non-compliance of Order 59 Rule 17(1) although the Petitioner takes up that position. The Court of Appeal after mentioning about Order 59 Rule 17 and its mandatory effect, in a separate paragraph went on to state that the learned High Court Judge had not erred in arriving at his conclusion in dismissing the notice of appeal.

[30] The conclusion that was arrived at by the learned High Court Judge was that he was dismissing the notice of appeal for non-compliance of his order of 9th March 2016. In his Ruling, the learned High Court Judge was very specific in his conclusion (see para.16 above) that he was dismissing the notice of appeal for non-compliance of the order made by him of serving the notice of appeal on the Respondent within 7 days and not for noncompliance of Order 59 Rule 10 as asserted by the Petitioner. The Petitioner has therefore misconceived his position when he referred to Order 59 Rule 10 and Rule 17.

[31] In the 2nd ground urged by the Petitioner, the Petitioner submitted that the Court of Appeal had failed to address the issue regarding the exercise of discretion by the learned High Court Judge by referring to Order 3 Rule 4(1) and (2) as submitted on behalf of the Petitioner.

- [32] The Petitioner's submission was that the learned High Court Judge should have exercised his discretion in terms of Order 3 Rule 4(1) and (2) and extended the time for service of the notice of appeal on the Respondent. The learned High Court Judge in his Ruling was dealing with the preliminary objection raised by the Respondent regarding the failure of the Petitioner to file the notice of appeal within the time that it was ordered to do so. In the course of his Ruling at paragraph [29] cited at paragraph [14] above he refers to the submission of the appellant based on Order 3 Rule 4(1) to the effect that the Court and/or exercise its discretion and extend the time given to the appellant regarding which the learned Judge had stated that he cannot agree with that submission. This shows that the learned High Court Judge had considered the submission based on Order 3 Rule 4(1).
- [33] The Petitioner's original application was for extension of time to file the appeal in terms of Order 59 Rule 10 which was allowed by the learned High Court Judge by his Ruling on 9th March wherein he stated that the notice of appeal should be served on the Respondent within 7 days. There was no further application for the invocation of Order 3 Rule 4(1) and (2) which are of general application and would be relevant only when there are no specific provisions under a particular order either for abridgement or extension. They had no effect when the Petitioner had already sought an order in terms of Order 59 Rule 10(1). In those circumstances no prejudice was caused to the Petitioner by the Court of Appeal not referring to Order 3 Rule 4(1) and (2) which had been considered by the learned High Court Judge.
- [34] In this whole process the Petitioner had in fact defaulted twice in appealing against the winding up Order of the Acting Master. Firstly, when filing the Notice of Appeal out of time which was allowed by the learned High Court Judge by his Ruling on 9th March 2016. The second default was the failure to comply with the second order of the Court of serving the Notice of Appeal within the stipulated time given by Court. No application was made by the petitioner to rectify the second default except in inviting the Court to exercise its discretion in terms of Order 3 Rule 4(1) in the written submissions filed in respect of the preliminary objection raised by the respondent. This was considered by the learned High Court Judge and refused specifically at paragraph [29] of his Ruling.

- [35] In Ground 3 the Petitioner takes up the position that the learned High Court Judge had dismissed the notice of appeal relying on Order 59 Rule 10 of the High Court Rules. As has been seen above the learned High Court Judge did not base his decision on Order 59 Rule 10 to dismiss the notice of appeal, he based his decision on the fact that the Petitioner had failed to carry out his order made on the 9th of March 2016. It was Order 59 Rule 10, that the Petitioner relied on when seeking enlargement of time to file its appeal, and the order made on the 9th of March 2016 was the Ruling given by the learned High Court Judge in respect of that application which required the Petitioner to serve the notice of appeal on the Respondent within 7 days.
- [36] It may be pointed out that Order 59 Rule 10 is the enabling provision for the grant of an extension of time to file an appeal and any order incidental to the granting of such an application has to be considered separately, which in this case was the serving of the notice of appeal within 7 days. The Petitioner in fact had the advantage of obtaining what was required by it by resorting to Order 59 Rule 10 which was the granting of the application on 9th March 2016 (Vide para.[7] above). Having obtained such an order, the Petitioner failed to comply with the second order of serving the notice of appeal within 7 days which led to the dismissal of the notice of appeal.
- [37] The Petitioner in its written submissions at paragraphs 30 to 32 conceded that the Petitioner's service of the notice of appeal three days late was a procedural default and attempts to overcome the default by stating that it should not have been the basis for the dismissal of its notice of appeal and that an extension of time to serve the notice of appeal would not have prejudiced the Respondent. The Respondent did not accede to this position and was objecting before the High Court, opposing the appeal before the Court of Appeal and also before this Court.
- [38] Regarding the 4th ground of appeal, the Petitioner made the submission that the Respondent had made an oral application before the High Court to have the notice of appeal dismissed without filing a summons under Order 32 of the High Court Rules. The parties were required to file written submissions by the learned High Court Judge when

the objection was taken by the Respondent regarding the non-compliance of the order of the learned High Court Judge of 9th March 2016, which they did and it is thereafter that the learned High Court Judge made his order dismissing the notice of appeal having considered those submissions. In those circumstances the Petitioner cannot complain that it was an irregular procedure that was followed.

[39] The Petitioner was basing his arguments on the basis that the grounds urged satisfied the threshold in Section 7(3) (c) of the Supreme Court Act.

[40] [19] Section 98(3)(b) of the Constitution of the Republic of Fiji, confers on the Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal. However, as provided in Section 98(4) of the Constitution, no appeal may be brought to the Supreme Court from a final judgment of the Court of Appeal "unless the Supreme Court grants leave to appeal."

[41] Section 7(3) of the Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal. It is provided in section 7(3) that-

"In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-
(a) a far reaching question of law;
(b) a matter of great general or public importance;
(c) a matter that is otherwise of substantial general interest to the administration of civil justice."

[42] Criteria set out in section 7(3) of the Supreme Court Act have been examined and applied by this Court in decisions such as *Bulu v Housing Authority* [2005] FJSC 1, CBV0011.2004S (8 April 2005), *Praveen's BP Service Station Ltd. v Fiji Gas Ltd.*, CAV0001 OF 2011 (6th April 2011), *Dr. Ganesh Chand v Fiji Times Ltd.*, [2011]

FJSC 2: CBV0005.2009 (8th April 2011), *Native Land Trust Board v. Shanti Lal and Several Others* CBV0009 of 2011 (25th April 2012), *Siva City Council v R B Patel Group Ltd* [2014] FJSC 7: CBV0006.2012 (17 April 2014).

- [43] It is clear from these decisions that special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.
- [44] As has been stated above, the appeal in the present case involves procedural matters. The High Court as well as the Court of Appeal had decided that the Petitioner had failed to comply with the order given by Court and that has been the basis for the dismissal of the Petitioner's case. It is a matter which relates to the interests of the two parties and does not give rise to a matter that is otherwise of substantial general interest to the administration of civil justice.
- [45] The grounds urged in the application of the Petitioner therefore do not meet the threshold that is required by Section 7(3) of the Supreme Court act.
- [46] I am of the opinion that there is no basis for the grant of special leave to appeal against the impugned judgment of the Court of Appeal. The application for special leave to appeal must therefore be dismissed. In all the circumstances of the case I make no order as to costs.

Stock J

Introduction

[47] I find myself in respectful disagreement with the decision of Chandra J to dismiss the application for leave and in order to explain why, I hope I may be forgiven for repeating the history of the proceedings, I do so because it takes twists and turns and setting out the history in this judgment saves the reader from cross-referring. It enables me too to highlight features of that history which I consider to be significant.

History

[48] A winding up order was made in October 2015 against which the petitioning company Extreme Business Solutions (“ESB”) applied for leave to file and serve a notice of appeal out of time. On 9 March 2016, Hamza J allowed the application and granted leave to file and serve the notice of appeal within seven days.

[49] It is significant that in his ruling granting leave the judge said that he was “of the view that there are grounds of merit in this case justifying the appellate court’s further consideration.”¹

[50] The notice of appeal was filed in time, namely, on 16 March 2016 but service was not effected until 21 March 2016.

[51] On 22 March 2016 there was a hearing for directions before Hamza J at which the respondent, Formscaff Fiji Limited (“Formscaff”) took preliminary objections; first, that the notice of appeal had not been served in time and second, that there had been a breach of Order 59 rule 17 of the High Court Rules. Order 59 rule 17 of the Rules states as follows:

“(1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service.

¹ Ruling 9 March 2016 at [37].

(2) The appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.

(3) If this Rule is not complied with, the appeal is deemed to have been abandoned.”

[52] On 22 March 2016, the judge made an order that pending determination of the preliminary objections, time for filing documents under the rules was to stop running. This too is significant.

[53] The parties filed written submissions.

[54] On 9 June 2016 the judge issued his ruling. In that ruling, he noted that the Notice of Appeal which had been filed was in a form which provided for the High Court Registry to allocate a date for the appeal. A notice of appeal does not normally contain such a provision. Relying on the judgment of Wati J in *Vishal Kumar v Avikash Pillay*², the judge held that the fact that there was provision for a return date meant that the condition prescribed by Order 59 rule 17(2) for service of a summons with a return date could be deemed to have been met. That apart, so he found, when the order was made on 22 March that time cease to run, ESB was still within time for filing and serving the summons. So the Order 59 Rule 17 point fell away. This finding that there was no breach of Order 59 rule 17 in part because ESB was not out of time is also significant.

[55] But the judge then held that service of the notice of appeal on Formscalf on 21 March 2016 had been five days late and that, although the defect in the notice of appeal could by virtue of Order 2 rule (1) be treated as a mere irregularity, the delay in service of the notice of appeal in compliance with the time allocated by the court could not be cured by application of that rule and he further appeared to suggest that it failed also by reason of a failure to follow the requirements of Order 59 rule (10). So he dismissed the application to extend time for service of the notice of appeal.

² Civil Appeal No HBA 04 of 2013, 14 February 2014

[56] Order 2 rule 1 (1) provides:

“Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceeding, any step in the proceedings or any document, judgment or order therein.”

Order 59 rule 10 provides:

“(1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period,
(2) An application under paragraph (1) shall be made by way of *inter partes* summons supported by affidavit.”

[57] What the judge said was this:

“[25] Even though the Notice of Appeal filed by the Appellant was irregular in form ... the Court could have acted under the provisions of order 2 and treated that failure as an irregularity and not as one which would nullify the proceedings.

[26] However in this case there is a more fundamental issue at hand. That is that the Notice of Appeal was not served on the Respondent within the time stipulated by the Court. That is not a defect that could be cured in terms of Order 2 of the High Court Rules.”

He then said that the notice of appeal should have been served on or before Friday 18 March 2016, but was only served on Monday 21 March 2016.

He continued:

“[29] The Appellant submits that despite the fact that the Notice of Appeal has already been served, this Court can and ought to exercise its discretion and extend the time given to the Appellant to serve its Notice of Appeal on the Respondent. Court cannot agree with this submission. There is a specific provision in the High Court Rules, namely order 59 Rule 10, under which such applications for extension of time for filing and serving of Notice of Appeal has to be made, as was done by the Appellant earlier in these proceedings.

Conclusion

[30] For all the aforesaid reasons, this Court upholds the first preliminary objection taken by the Respondent that the Appellant has failed to serve the Notice of Appeal on the Respondent within the time stipulated by the Court.”

[58] The basis for that decision is not entirely clear to me. The court had, in the written submissions made in May 2016 been asked to exercise its discretion under Order 3 rule 4³, to which no express reference is made in the ruling and it is unclear whether the judge thought that the suggested non-application of Order 2 rule1 was relevant in this regard. Although discretion is mentioned, it is immediately followed by reference to order 59 rule10 which might be taken to suggest that failure to observe that rule stood in the way of that exercise of that discretion in ESB’s favour. I assume that the rule was not observed in the failure to file an *inter partes* summons.

[59] ESB’s appeal to the Court of Appeal was dismissed on 1 June 2018. The Court found that the judge had erred in his calculation of time in that ESB was only three days out of time in serving the notice of appeal and not five days.⁴ It is not clear to me what finding that Court made as to the significance of that delay and whether the Court agreed with the judge that the delay was fatal to ESB’s application to extend time. What is clear however is that the Court of Appeal found against ESB because of the deeming provision of order 59 rule 17(1) and held that therefore the appeal fell to be dismissed.

The petition for leave

[60] The petition for leave to appeal contends:

(1) that the Court of Appeal failed to recognise that ESB was not out of time for filing an Order 59 rule 17 summons, as held by the judge in June 2016;

³ Paragraph 2.22; page 410 High Court Record

⁴ Court of Appeal judgment para [13].

- (2) that neither the judge nor the Court of Appeal considered the broad discretion conferred by Order 3 rule 4 to extend time;
- (3) that the judge erred in holding that failure to observe the requirement of order 59 rule 10 was fatal to the application to extend time, an error not corrected by the Court of Appeal; and
- (4) that the insistence on proper form rather than the merits sat ill with the fact that when Formscalf itself took its preliminary objections in March 2016, it did so without filing a summons under Order 32.

Analysis

- [61] The complaint that the Court of Appeal overlooked the finding that ESB was not out of time in respect of the requirement to serve an affidavit of service seems to me to be correct.
- [62] That leaves the three day delay beyond the time limit for serving the notice of appeal. Assuming for the moment that there is a discretion for extending time there appears to me to be no good reason why that slight delay should trump the objective which surely is the hearing of an appeal which the judge decided had apparent or prima facie merit. It is difficult to see how Formscalf could sensibly be said to be prejudiced by the extension of time.
- [63] The necessary discretion is to be found in Order 3 rule 4 which reads, in so far as is presently relevant, as follows :

“(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act in any proceedings,

(2)The Court may extend any such period as is referred to in paragraph(1) although the application for an extension is not made until after the expiration of that period.”

- [64] In so far as it is said that no summons was issued seeking that extension of time under order 59 rule 10, the fact that ESB was asking for an extension of time was at all material times obvious and Order 3 rule 4 was expressly prayed in aid in ESB's written

submissions dated 2 May 2016.⁵ That is not to suggest that that was necessarily the first time an extension was sought in the exercise of the court's discretion for we see from the judgment of 9 June 2016 that oral submissions were made at the hearing of 22 March and one can, I think, safely assume that in opposing Formscalf's objections on that day an application for an extension of time was either express or implicit.

[65] I accept that there was in this case a failure to comply with a court order as to time but it is to be noted that the discretion to extend time, conferred by order 3 rule 4, contemplates that such breaches are not of themselves necessarily fatal, although one might observe that the position would be different in the case of an "unless" order⁶. Nonetheless, what this all amounts to in this particular case is the refusal to extend time for service of a notice of appeal where service was a mere three days out of time, where the notice of appeal was filed in the time stipulated, where the judge had held that, *prima facie*, the prospective appeal had merit and where it is impossible to discern that Formscalf could have been in the least prejudiced by an extension. To refuse in these circumstances a three day extension of time seems to me to permit minor breach to trump merit and that must, I respectfully suggest, be inimical to the objective of the Rules.

[66] The guiding principle is this:

"The object of the rule is to give the court a discretion to extend time with a view to avoidance of injustice to the parties. . . 'When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the

⁵ Paragraph 2.22; page 410 High Court Record.

⁶ An unless order is an order which provides that unless an act is done within a specified time, a certain unwelcome consequence will follow eg the defence will be struck out. They are not intended to be used regularly or as a matter of course but only as a last resort where there has been a history of a failure to observe orders or directions or rules and the line must finally be drawn or where otherwise the other party will be materially prejudiced by a (further) failure by the errant party to observe a direction or rule and where a costs order is not appropriate to meet that prejudice. See the Supreme Court Practice 1999 in the commentary at pp 762-763 in relation to Order 42 rule 2 of the Rules then applicable in England and Wales

objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.”⁷

[67] The principles are more fully canvassed in *Finnegan v Parkside Health Authority* [1998] 1 All E.R. 595 in its reference to a number of other authorities and it is a judgment which merits study. The theme emerges that whilst the rules are devised to promote expedition and are requirements to be met, procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs. That said, an eye must be trained on the particular circumstances so as, for example, not to allow a wealthy plaintiff to flout the rules knowing that he has a deep pocket to meet such costs orders as might be made. “A rigid mechanistic approach is inappropriate.”⁸ No doubt the length of the delay will be a relevant factor but generally the question is what the overall justice of the case requires.⁹

[68] Whilst the instant case is one of not complying with a court stipulated time frame rather than with one stipulated by the rules, the same general approach seems to me to be apt, which is not to say that a court order is to be treated lightly. It is important to recognise that Order 3 rule 4 itself contemplates extensions of time to comply with such orders, even where the application is made after expiry of the time stipulated. Applying this approach to the instant case, it seems to me to be clear that time should have been extended.

[69] I do not, with respect, agree with the analysis in the judgment of Chandra J as to the effect of Order 59 rule 10.¹⁰ Order 59 rule 10 does not cut across Order 3 rule 4. It merely stipulates the body before whom an application must be made and the form in which it is

⁷ Supreme Court Practice 1999 p 18 citing Bramwell LJ in *Atwood v Chichester* (1878) 3 QBD 722 at 723 in relation to Order 3 rule 5 which is mirrored in its relevant part by the High Court Rules, Order 3 rule 4.

⁸ *Castellow v Somerset CC* [1993] 1 All ER 256 at 263-264

⁹ *Ibid* cited in *Finnegan* at 599 c

¹⁰ Judgment of Chandra J at [33].

to be made. Furthermore, the suggestion⁴¹ that Order 3 rule 4 is only relevant where there is no specific provision under a particular order – by which I assume is meant a court order – for extension of time does not, in my respectful opinion, sit comfortably with the very provisions of order 3 rule 4 (1) which confers discretion to extend time where that time has been prescribed by the Rules “or by any judgment, order or direction”.

[70] The fact that no summons was issued under Order 59 rule 10 mattered not in the circumstances of the case. An application for extension of time had obviously been made and if the absence of a summons was thought to be problematic, the order extending time could have been made on an undertaking by ESB to file the requisite form within a stipulated time. At the end of the day one is talking of a mere three day default with no consequential prejudice to the other party and it seems to me that the refusal to extend time does not accord with the principles underlying Order 3 rule 4.

[71] On the question whether this Court has jurisdiction to grant leave, I agree that the grounds as formulated are too fact specific readily to fit into one of the grounds warranting leave under section 7 (3) of the Supreme Court Act but the reality is that there is implicit in them and in the arguments raised an issue which is of substantial general interest to the administration of civil justice, namely, the proper approach to Rule 3 rule 4 of the Rules of the High Court.

Conclusion

[72] For the reasons I have provided, I would grant leave to appeal, treat the hearing of the application as the appeal, allow the appeal, set aside the order of the judge by which he refused an extension of time in which to serve the notice appeal, set aside the orders of

⁴¹ Judgment of Chandra J at [33]

the Court of Appeal dismissing the appeal, as well as the costs orders of the judge and the Court of Appeal and I would allow the application to extend time for service and award ESB the costs of this appeal, of the application to the judge and of the appeal to the Court of Appeal.

Orders

1. Leave is granted to appeal the judgment of the Court of Appeal dated 1 June 2018.
2. The application for leave to appeal is treated as the hearing of the appeal and the appeal is allowed.
3. The orders of the Court of Appeal of 1 June 2018 are set aside.
4. The orders of Hamza J dated 9 June 2016 are set aside.
5. The petitioner's application for extension of time to serve the Notice of Appeal dated 16 March 2016 is allowed and time is extended to and including 21 March 2016, when the Notice was in fact served and further, such requirements as are prescribed by the Rules of the High Court as to summonses or affidavits in support of the application are dispensed with.
6. There be no order as to the costs of the application before Hamza J to extend time for service of the Notice of Appeal.

7. The respondent to pay to the petitioner costs of the appeal to the Court of Appeal in the sum of \$4000.

8. The respondent to pay to the petitioner the costs of this appeal in the sum of \$4000.



A handwritten signature in black ink, appearing to read "Saleem Marsoof".

Hon. Justice Saleem Marsoof
JUDGE OF THE SUPREME COURT

A handwritten signature in black ink, appearing to read "Suresh Chandra".

Hon. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT

A handwritten signature in black ink, appearing to read "Frank Stock".

Hon. Justice Frank Stock
JUDGE OF THE SUPREME COURT