

BANK OF TONGA v 'ALATINI & MUTI

Court of Appeal

Martin CJ, Roper and Morling JJ

Appeal No 16 / 1990

12 September 1990

10 *Procedure - appeal out of time - principles for granting leave - conditions attached to leave granted*

Appeal - leave to appeal out of time - conditions attached to leave granted

On 22 January 1990 the Supreme Court gave a decision that the security held by the Bank over property of Paula Muti did not take priority over the enforcement of a judgment against Paula Muti by Diana 'Alatini. Time for appealing from this decision expired on 19 February 1990, and on 23 March 1990 the Bank filed an application for leave to appeal out of time. This application was refused by the
20 Supreme Court and the Bank appealed.

HELD

Allowing the appeal on terms.

1. The Supreme Court was right to refuse leave on the ground placed before it which showed that the Bank had failed to seek legal advice until the time for appeal had nearly expired;
2. In view of the importance to the Bank and its customers of the decision of the Supreme Court on 22 January 1990 as to the priority to be given to its securities, leave to appeal would be granted, but subject to a written
30 undertaking by the Bank that it would not enforce its security against the first respondent and would pay her costs regardless of the outcome; and subject also to the Bank instituting the appeal within 7 days from the date of granting leave;
3. If the undertakings referred to were not given by the Bank, the appeal would be dismissed.

Counsel for the appellant : Mr F. Hogan

40 Counsel for the respondent : Mr S. Etika

Judgment

This is an appeal against an order made by Webster J. refusing leave to appeal out of time against a judgment delivered by his Honour on 22 January 1990.

His Honour's decision was given in proceedings which have had a lengthy history. On 29 June 1988 Vakapuna 'Alatini recovered a judgment for the amount of \$24,600 plus interest against Paula Muti. This judgment has not been satisfied. Mr 'Alatini is now deceased and his widow Diana 'Alatini is the administratrix of his estate. At her instance a motor vehicle and certain chattels said to be Mr Muti's property were seized under distress. Mr Muti thereupon applied to the Court for
50 the release of the property upon the ground that the property was not his, or alternatively that it was jointly owned by him and his wife and was also subject to a security in favour of the Bank of Tonga.

Webster J. found that the property was jointly owned by Mr and Mrs Muti and that it was subject to an equitable mortgage in favour of the Bank. However, he held that the Bank's security did not entitle it to priority over the proceeds of the sale of the property upon its sale under distress. It is from this last-mentioned ruling that the Bank wishes to appeal.

The last day for filing a notice of appeal against Webster J's judgment of
60 22 January 1990 was 19 February 1990. On 23 March the Bank filed an application for leave to appeal out of time. This application was heard and refused on 10 April. An affidavit in support of the application was made by the Bank's lending manager. In it he said that the security document executed by Mr Muti was in the standard form used by the Bank in all similar transactions between it and its customers, and that there are currently over 5,000 such documents presently in existence. He said that the Bank had always been of the view that the document gave it priority over claims of unsecured creditors to the property (or the proceeds of sale thereof) the subject of the security document.

The only explanation given for the failure to appeal within time was that the
70 Bank had sought legal advice on the matter and had acted so soon as the advice had been forthcoming. However it appears that the Bank failed to seek legal advice until time for appeal had all but expired.

Webster J. rejected the application for leave to appeal out of time and on the material before him he was plainly correct to do so. The mere importance of the matter to the Bank was no ground for granting the application. Indeed that fact made the Bank's failure to appeal in time even less excusable.

Mrs 'Alatini has been paid a substantial sum of money in satisfaction of the judgment obtained in 1988. Some part of this sum was paid by Muti after Webster J's judgment was given on 22 January 1990. A proportion of the money paid by
80 Muti was raised by the sale of some of the property charged to the Bank. In these circumstances, we agree with Webster J that it would not be right to expose Mrs 'Alatini to the risk of having to refund money which she may well be unable to do. She was justified in acting on the faith of Webster J's judgment, which gave her priority over the Bank.

As is pointed out in the White Book, (1988) p. 865, it is entirely in the discretion of the Court to grant or refuse an extension of time in a case such as the present. It is impossible to say that Webster J. erred in exercising his discretion. Indeed,
90 on the facts before him, we would also have refused the application.

However, we appreciate the importance to the Bank and its many customers of the Court of Appeal making a final determination of the Bank's rights vis a vis unsecured creditors under its security document. For that reason and upon the Bank giving undertakings (as set out in para. 1 hereunder) which will fully protect Mrs Alatini, we make the orders as set out in paras. 2 - 5 inclusive.

1. Upon the appellant within 7 days from this date undertaking in writing to the court that it will not, directly or indirectly, seek to enforce its rights under the Loan Agreement made with Paula Muti on 19 April 1989 in priority to the rights of the first respondent;
100 And upon the appellant with 7 days from this date further undertaking in writing to the Court that it will consent to an order that it pay the first respondent's costs of any appeal it may institute against the judgment of Webster J. given on 22 January 1990, irrespective of the outcome of any appeal;
2. Leave to appeal granted.
3. Any appeal instituted pursuant to the leave referred to in para 2 is to be instituted within 7 days from this date.
4. The appellant is to pay the first respondent's costs of this application and of the proceedings (including the application for extension of time) before Webster J.
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5. If the undertaking referred to in para 1 are not furnished to the Court within 7 days of this date, the appeal is dismissed with costs.