

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

CIVIL APPEAL NO. ABU0036 OF 2003S
(High Court Appeal No. HBC0058 of 1998S)

IN CHAMBERS

BETWEEN:

GAVIN SNOW

Appellant

AND:

- 1. BRUCE CORNISH
- 2. CHATTUR DASRATH SINGH & ANOTHER
- 3. REGISTRAR OF TITLES

Respondents

Coram:

The Hon. P.G.S. Penlington, Justice of Appeal

Hearing:

19th August 2003, Suva

Counsel:

Mr. S.T. Naqase for the Appellant
Mr. R. Smith for 1st and 2nd Respondents
Ms N. Basawaiya for 3rd Respondent

Date of Judgment: 25th August 2003, Suva

JUDGMENT

This is an application for leave to appeal out of time under Rule 17(3) of the Court of Appeal Rules. It came before me on 19 August 2003 sitting as a single judge.

On 5 September 1992 Gavin Snow Senior died. He left a will dated 30 August 1988. Probate was granted to the second respondents as executors and trustees named in the will. Under the will the deceased left a copra plantation to the first respondent.

On 12 January 1999 the second respondents as executors and trustees registered a transfer of the copra plantation property to the first respondent.

The appellant as plaintiff subsequently commenced an action in the High Court against the first, second and third respondents as defendants. He alleged that the plantation had been given to him by the deceased in his lifetime. The appellant relied on a document which was not in the form of a deed dated 2 May 1992 and which was signed by the deceased. In that document the deceased purported to give:

".....my title assets and any other incumberrances thereto and the entire ownership of the said property to my immediate next of kin and my namesake (the appellant)"

The document then continued:

"I now give my consent to (the appellant) to duly takeover the management and any other responsibilities in respect of the said property to ensure that efficiency and maximum productivity is achieved."

The subject matter of the document was the Waiwai Estate which was the same property as the copra plantation transferred to the first respondent by the second respondents in pursuance of the deceased's will.

The appellant did not take possession of the subject property at any time and no formal steps were taken to transfer the property to him before the death of the deceased.

The action came on trial before Scott J. There was an agreed statement of facts. There was no oral evidence. The legal issues requiring the determination of the Judge were stated to be:

- (i) whether the property known as Waiwai formed part of the deceased's estate at the time of his death
- (ii) whether the property in certificate of title volume 52 folio 5125 was gifted prior to the death of the deceased
- (iii) whether the appellant had any entitlement to visit or manage Waiwai or derive any income therefrom
- (iv) whether the first respondent has good title to Waiwai pursuant to the will of the deceased.

In a reserved judgment the trial judge held that the transfer document was not an effective transfer document in law, that the deceased had not done all that was necessary for the transfer of the property to the appellant and that in any event it was an incomplete gift. The appellant's claim was accordingly dismissed. That judgment was delivered on 24 January 2003. Formal judgment was sealed on 27 January 2003. The time for appeal therefore expired on 10 March 2003.

The appellant's lawyer at this time was a Mr. Tevita Fa.

The appellant did not appeal within time.

On 31 March 2003 the appellant filed an application for leave to appeal out of time with an affidavit from the appellant in support. By this stage he had moved to another lawyer Mr. S.T. Naqase.

On 9 April 2003 there was a hearing before Reddy P. After hearing counsel leave was granted on terms that the appeal be filed within 14 days of that date, that is by 23 April 2003. Reddy P. also ordered that all other rules be complied with.

The notice of appeal while dated 23 April 2003 was not filed until 25 April 2003 that is two days late. Service was effected on the same day.

Putting aside the question of whether the appeal was properly brought because the condition imposed by Reddy P. was not complied with, Rule 17(1)(a)(ii) was not complied with. The appellant did not file an application for the Registrar to fix security for costs.

As the result on 2 May 2003 (assuming the appeal was properly commenced) the appeal was deemed to be abandoned under Rule 17(1). A fresh notice of appeal was not filed within 42 days of that date as it could have been under Rule 17(2).

The second application for leave to file an appeal out of time was filed on 22 July 2003. The first 8 paragraphs of the appellant's affidavits in support were in the same words as the first 8 paragraphs of the affidavit filed in support of the earlier application for leave to appeal out of time. The evidence in these paragraphs related to events between the delivery of judgment and the filing of the first application for leave to file an appeal out of time. In these paragraphs the appellant explained that when judgment was given his solicitor was then under medical treatment overseas. His solicitor's advice as relayed from overseas was to the effect that he should appeal. The appellant did not see that solicitor until the second week in March. That solicitor then told the appellant to seek the services of another solicitor as he had not yet recovered from his illness. The appellant then

shopped around for another lawyer and ultimately instructed Mr. Naqase as his solicitor.

The appellant's affidavit in support of the second application did contain some evidence about the appellant looking for the title to the subject property and discussions with the deceased before his death. As the trial had proceeded on an agreed statement of facts, that evidence was irrelevant for present purposes.

There was no other evidence before me. The reasons for the failure to comply with the order of Reddy P, the failure to apply for an order for security for costs and the failure to file a fresh notice of appeal under rule 17(2) of the Court of Appeal Rules were not the subject of evidence..

The relevant principles in relation to the discretionary power of the court to extend time for appealing are well settled. The factors which are normally taken into account in deciding whether to grant an extension of time are -

- (1) the length of the delay
- (2) the reasons for the delay
- (3) the chances of the appeal succeeding if the time for appealing is extended
- (4) the degree of prejudice to the respondent or respondents if the application is granted.

Mr. Naqase for the appellant accepted that there had been defaults and that they had not been explained. He accepted that the appellant had already had one indulgence from the Court. He submitted that there would be greater prejudice on the appellant than on the respondents if the application was refused as a refusal would bring the appellant's claim to an

end while for the respondents the granting of leave would simply extend the period of uncertainty.

Mr. Smith for the respondents emphasised four matters.

First Mr. Smith submitted that as the appeal was filed on 25 April 2003 it was not properly brought because the appellant had failed to comply with the condition imposed by Reddy P. as to the time of filing.

Secondly the appellant had already had an indulgence from the Court. He was now seeking another.

Thirdly since the granting of leave by Reddy P. there had been further unexplained defaults by the appellant, namely, not complying with the condition imposed by Reddy P., not applying for security for costs in time and not filing a fresh notice of appeal under Rule 17(2).

And fourthly the appellant did not have an arguable case because on the agreed facts and the relevant settled law applicable, the gift was incomplete as there was no delivery by the deceased of the title to the appellant in the deceased's lifetime. The appellant Mr. Smith contended that the appellant did not have any realistic prospect of succeeding on the appeal.

Ms. Basawaiya indicated that the third respondent abided the decision of the Court.

In reply Mr. Naqase conceded that for a gift to be complete title must be delivered.

I have carefully considered the competing arguments. In exercising my discretion I have taken into account the considerations which I now set out.

First the last day for filing an appeal was 10 March 2003. Over 5 months has elapsed since then. Even if there was a valid appeal in April that appeal came to an end and there has been further delay since that appeal was deemed to be abandoned.

Secondly the appellant, has already received an indulgence from the Court. Reddy P. granted leave to extend time for the filing of an appeal. That indulgence was squandered by the appellant. The appeal was not filed in compliance with the condition imposed. I find it unnecessary to decide whether the appeal ended at that point. On the view which is most favourable to the appellant, further defaults occurred. The appellant did not apply for security for costs within time and did not take advantage of Rule 17(2) by filing a fresh notice of appeal within time. This lamentable record of default is unexplained, and it does not inspire the Court with any confidence that if another indulgence is granted there would be compliance with the order of the Court and the Court of Appeal Rules.

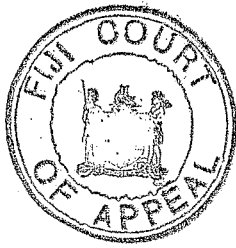
Thirdly I do not consider that the proposed appeal has any realistic prospect of success. The action proceeded before the trial judge on an agreed statement of facts. The case involved the application of settled law to those facts. That law is against the appellant for the reasons set out by the Judge. In my view the gift was incomplete. Mr. Naqase's concession in his reply accepted that point.

Fourthly I accept that if leave is refused the appellant will be at the end of the road, whereas if leave is granted the appeal will prolong the uncertainty for the respondents.

I have weighed these relevant considerations. I have reached the clear conclusion that while the prejudice factor is in the appellant's favour the other three matters are against him and are indeed decisive.

Accordingly leave to extend time for appealing is refused.

The respondents are entitled to costs plus disbursements (if any). They will be as agreed or taxed.



A handwritten signature in cursive script, appearing to read "P.G.S. Penlington".

.....
The Hon P.G.S. Penlington
Justice of Appeal

Solicitors:

Messrs S.T. Naqase, Suva for the Appellant
Munro Leys, Suva for 1st and 2nd Respondents
Office of the Attorney-General, Suva for 3rd Respondent