BANK OF HAWAII

v.

MAXWELL JOHN REYNOLDS

[HIGH COURT, 1998 (Pathik J) 29 June]

Civil Jurisdiction

Practice: Civil- application for leave to appeal out of time- principles applicable.

In dismissing an application for leave to appeal out of time against an interlocutory order the High Court again emphasised that such applications must be well founded. It also pointed out that interlocutory orders are prima facie presumed to be unappealable.

Cases cited:

Ashmore v Corp of Lloyds [1992] 2 All ER 486
Ex parte Bucknell (1936) 56 C.L.R. 221
Gatti v. Shoosmith [1939] 3 All E.R. 916
Kelton Investments Ltd and Tappoo Ltd v. Civil Aviation Authority of Fiji & Anr (Civ. App. 51/95)
Latchmi & Anor v. Andrew John Moti & Ors 10 FLR 138
Ratnam v. Cumarasamy & Anor. [1964] 3 All E.R. 933
Re Manchester Economic Building Society (1883) 24 Ch.D. 488
The Commissioner of Inland Revenue v. James Michael Ah Koy (Civ. App. No. 197/73)

Interlocutory application in the High Court.

G.E. Leung for the Plaintiff
K. Muaror for the Defendant

Pathik J:

This is the defendant's application for an order that he be granted leave to appeal against the Order granted by this Court on 2 February 1998 notwithstanding that the time limited by The High Court Rules has expired.

The Order of 2 February is in the following terms:-

> UPON READING the Summons dated 28th January, 1998 and the affidavit of Meena Datt f /n Parmeshwar Datt filed herein and upon hearing Mr. Graham Leung of Counsel for the Respondent/Plaintiff and there being no appearance by Counsel for the Applicant/Defendant IT IS THIS DAY ORDERED that the default judgment in this action shall stand and that the Summons dated 28th January, 1998 be dismissed and it is further

ordered that the Applicant do pay the Respondent's costs assessed at $250.00.

A Background facts

On 14 November 1997 an Order was made setting aside default judgment conditional upon the defendant paying into Court the sum of $200,000.00 or giving security for that amount to the satisfaction of the plaintiff within 30 days from 14 November. Various letters passed between Counsel regarding
B security that was being offered by the defendant which security the defendant says was sufficient, but it was not accepted by the plaintiff. Whereupon on 27 January 1998 the defendant filed a Summons seeking an order from the Court that the security offered be deemed sufficient for the amount ordered on 14 November.

C On 2 February 1998 the said summons was dismissed by the Court after hearing the Respondent and after the defendant's counsel failed to appear on his application. The affidavit says he was 'late'; the matter was for argument in Chambers at 10.30 a.m. and Court waited until 10.45 a.m. This Counsel was seen by me in the corridors of the Government Buildings at about the time he was supposed to be before me.

D On 5 February another Summons was filed and Court made an order as follows:-

> Upon hearing Mr. Kafoa Muaror of Counsel for the Applicant/ Respondent and upon hearing Mr. Graham Leung of Counsel for the Respondent/Plaintiff, and upon reading the Applicant's
> E summons dated 5th February 1998, it is this day ordered that this Honourable Court is *functus officio* in respect of the said summons and that the Court's Order of 2nd February 1998 remains preserved. It is further ordered that the Applicant/ Defendant do pay the Respondent/Plaintiff's costs at $250.00.

F When I made this Order I noted as follows:-

> "Counsel for Applicant is not present to pursue the application. This is disrespect to Court -no courtesy shown to Court. In any case having heard Mr. Leung I consider this to be a frivolous application and made well out of time. The Court's order is quite clear and that has not been complied with. The Applicant
> G is evidently playing for time. The application is dismissed with costs in the sum of $250.00."

Further to this Order the defendant's solicitors now make the present application which is out of time and the reason given for the delay is (as stated in the affidavit in support) "that the lawyer handling this matter in our office had commitment to a program during the Easter long weekend and therefore the documents could only be completed as of the date hereunder".

Defendant's/Applicant's submission

Mr. Muaror says that he should have filed an Appeal 21 days after order of 2 February 1998 and that would have expired on 23 February. In response to the question from Court that the Defendant "wants his day in Court?" counsel said "if Your Lordship puts it that way"

He proceeded with his submissions by referring to a draft Notice of Appeal to the Court of Appeal (MD 11 to affidavit in support of Meena Datt) which states the Ground of Appeal as:

> "1. The learned Judge erred in finding that the security offered by the Appellant/ Defendant pursuant to his Lordship's Ruling of 14 November 1998 (should be 1997) was inadequate."

I did not take too kindly to this ground as it was completely false and should never have been made an annexure to the affidavit unless it was true. The Court had not made any such determination. This was pointed out to Mr. Muaror in the following manner:

"Court:	That ground is false
Kafoa:	That is a draft
Court:	That is false - don't put false document before this Court to mislead. That is not what happened. If you persist in that I will report you to Law Society for disciplinary action. Proper way for you is to withdraw that exhibit.
Kafoa:	Notice of Appeal will be amended - no such finding. Will file a proper one at the appropriate time."

Although Counsel is applying for leave to appeal out of time there is no formal application for stay. He says that the defendant wants his summons heard. On costs he said that two orders have already been made for costs but not paid. He said that his client who is in Tasmania will pay.

Plaintiff's/Respondent's submission

Mr. Leung submitted that as for costs, the Court Orders are there and they should be complied with expeditiously.

He said that the whole history of this case is one of appalling delay and Mr. Muaror concedes that he is time-barred. He comes to Court some 12 weeks later. Mr. Leung then refers to paragraphs 3(a) of Meena Datt's affidavit which reveals that the lawyer was 'busy' doing other things instead of attending to this case. Now they are asking for extension of time when the delay is unacceptable.

Mr. Leung further submitted that this is a hopeless case. It lacks *bona fides*. He asks what is the practical effect of appeal succeeding? He said we will be back to square one. Leave to appeal can only be granted in exceptional circumstances and it must be seen in the context of what preceded. Mr. Leung says proceedings have been delayed and justice to plaintiff should also be considered so that he can enjoy the fruits of the judgment which is in his favour.

Counsel says that outstanding costs and costs of this application should be paid by the defendant within 7 days.

Consideration of the application

This application has to be considered bearing in mind the chronology of events. It is a classic example, in my view, of the abuse of the process of the court. I have to go back to the history of this case and I refer to the order which I made on 14 November setting aside judgment conditional upon payment into Court of $200,000.00. The defendant did not comply with this order. If he was at all unhappy with it he could have appealed. He chose not to do so but instead, to overcome his failure to comply with the Order, he tries to get around it by filing summons wanting the Court to declare that the security which he alleges he offered was ample but the plaintiff had earlier rejected that offer. My Order stated that if there was any security it had to be to the satisfaction of the plaintiff. There was no point in coming to Court for the purpose as my Order was as clear as crystal and the proper advice to the defendant would have been to appeal within the time allowed to deposit $200,000.00. It was no use dilly-dallying and not taking the required steps within the time frame. It is clearly an abuse of the process of the Court filing this Summons. This Court is *functus officio* once it had made the decision on 14 November.

To make matters worse the learned counsel for the defendant annexes a false draft Ground of Appeal to the Fiji Court of Appeal (annexure MD 11) for me to consider in this application. There is a lot I would like to say on counsel's conduct but for the moment I need only say that he should not be allowed to get away with his way of practising law particularly with false misleading statements and oblivious of time factor in regard to proceedings in Court be they filing of documents or attending in Court or Chambers before a judge. I have already told him about my disgust at his whole conduct and I will stop at that except to say that this practitioner needs guidance from senior practitioners.

The Law

This is an application for leave to Appeal out of time from the interlocutory order that this Court made on 2 February 1998. In this regard I refer to the following passages from the judgment in Ex parte Bucknell (1936) 56 C.L.R. 221 at 225 which are pertinent:-

> "At the same time it must be remembered that the *prima facie* presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under sec. S5(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment."

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He goes on to state at p.225:

> "But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The court will examine each case and, unless the circumstances are exceptional, it will not grant leave if it forms a clear opinion adverse to the success of the proposed appeal."

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On leave to appeal the following extract from the decision of the President, Fiji Court of Appeal in Kelton Investments Limited and Tappoo Limited v. Civil Aviation Authority of Fiji & Anr. (Civ. App. 51/95) is also relevant and I adopt the same view to the facts and circumstances of this case:

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> "The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal is not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that, this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted."

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This is one case where the principles governing application for leave to seek judicial review of interlocutory orders as stated in the Chief Justice T U Tuivaga's Practice Direction No. 1 of 1993 dated 30 September 1993 is worthy of note. It is so important that I ought to set it out in full which is as hereunder:

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> "It has long been settled law and practice that interlocutory orders will seldom be amenable to appeal. It is for this reason that leave to appeal against such orders is usually required (See Court of Appeal Act - Cap. 12, Section 12(2)(f)). Even where leave is not required the policy of the Court of Appeal is to uphold interlocutory decisions and orders of the trial Judge unless they are plainly wrong (See e.g. Ashmore v Corp of Lloyds [1992] 2

All ER 486 H.L.)"

A Although, for obvious reasons, Order 53 does not contain a leave provision similar to that found in the Court of Appeal Rules the principles governing interference with interlocutory decisions (which are based on the need to ensure the efficient and just disposal of the work of the Courts) are the same in both jurisdictions.

B The granting of leave is a discretionary matter; here the reasons for delay are deplorable and the prospect of success being so minimal that leave has to be refused in this case. On the exercise of discretion Brett M.R. in Re Manchester Economic Building Society (1883) 24 Ch.D. 488 at p.497 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
C bound to give the special leave if justice requires that that leave should be given."

In exercising its discretion the Court has also to ensure that the interests of the respondent are considered equally with those of the applicant (Latchmi & Anor v. Andrew John Moti & Ors 10 FLR 138 at 142)

D Just as in this case, where it is said Counsel was engaged elsewhere, so in The Commissioner of Inland Revenue and James Michael Ah Koy (Civ. App. No. 197 of 1973) counsel being away was not regarded as an excuse. This is what the judgment states:

> "It was perhaps unfortunate that Mr. Jones was away from the
E Crown Law Office from just before delivery of the Supreme Court judgment until six weeks before this application was filed; but that in itself does not, in my view, amount to sufficient reason for granting this application. There are no doubt fully competent Barristers and Solicitors in the Crown Law Office, and if the matter were considered of sufficient public importance to make
F a further appeal desirable then it would have been a simple matter to lodge the appropriate notice within the time specified."

Here there was no question of merits as apart from the false ground there was no other draft Ground of Appeal. Even if there was any ground the question of merit does not arise for Master of the Rolls in Gatti v. Shoosmith [1939] 3 All E.R. 916, 920 said:
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> "We are not I think concerned here with any question at all as to the merits of this case or the probability of success or otherwise."

And at p.919 ibid Lord Greene M.R. 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."

For the reasons I have given hereabove, I do not find that there are any good reasons to grant extension of time and leave to appeal even in the interests of justice. In Ratnam v. Cumarasamy & Anor. [1964] 3 All E.R. 933 at p.935 a decision of the Privy Council, the granting of time aspect has been summed up very well as follows:

> "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."

Conclusion

In the outcome, for the above reasons bearing in mind the principles involved in an application of this nature and in view of the authorities cited, and no sound reason having been advanced for the delay and no acceptable ground stated for leave and the prospect of appeal succeeding being nil in my view not even demand of interest of justice, the application is refused. The defendant will pay the plaintiff's costs of this application in the sum of $200.00. These costs and the previous costs are ordered to be paid by the applicant within 21 days from the date of this decision.

(Application dismissed.)