BHARAT KUMAR NARSEY v THE ATTORNEY-GENERAL FIJI AND SHEIKH SHAH (CAV0024 of 2011)

SUPREME COURT — CRIMINAL JURISDICTION

CALANCHINI AP

19 March, 5 April 2012

Practice and procedure — time limit extension — delay in making application — length of delay — reasons for delay — chances of success — vacant possession — mitigation of loss — unpaid rent — Court of Appeal Act s 20(1)(b) — High Court Rules O 18 rr 7, 12 — Land Transfer Act s 169.

The applicant was the owner of premises which were rented to the first respondent under a tenancy agreement. The second respondent occupied the premises and the rent was paid by the first respondent. The second respondent's employment was terminated, and he continued to occupy the premises without the permission of the first respondent. The first respondent served a notice of termination which became effective on 30 November 2001. The second respondent continued to occupy the premises until 2004 without paying rent. After the second respondent vacated the premises, the applicant commenced action in the High Court. The High Court refused to award general damages as the applicant had failed to take any steps to mitigate the loss. The applicant sought an order that the part of the High Court judgment dealing with the award of damages be set aside. The application was filed about 90 days out of time.

Held –

(1) Where there is a short delay in making an application and where that short delay is fully and satisfactorily explained, then the Court's discretion is unlikely to be exercised on the side of refusing an extension of time, unless an extreme lack of merit justifies such a refusal. However where the delay is much longer and the explanation for the delay is not wholly excusable, the applicant would need to establish much more merit for the court to exercise the discretionary balance in his favour. In this case, the delay was extensive and the explanations were not excusable.

Norwich & Peterborough Building Society v Steed [1991] 2 All ER 880 cit

(2) This is a situation in which it was reasonable to expect the applicant to mitigate his damage by commencing proceedings under section 169 of the Land Transfer Act and to exhaust that remedy before considering commencing the present proceedings against the first respondent for unpaid rent and costs incurred in the eviction proceedings.

Walker v Geo H Medicott & Sons (a firm) [1999] 1 WLR 727 cit

(3) Order 18 r 12(4) of the High Court Rules applies to all claims for damages, whether special or general. The proviso is that in the case of special damages, there will be no issue in dispute unless the plaintiff has pleaded and particularised his special damages. Apart from this requirement, so far as the present appeal is concerned, matters that relate only to damage and damages are not relevant for the purposes of pleading. The first respondent could not and need not plead to damages. All it was required to do was to dispute them.

Application dismissed.

Cases referred to

Tevita Fa v Tradewinds Marine Ltd and Another (unreported civil appeal No 40 of 1994 delivered 18 November 1994), applied.

Ibrend Estates BV v NYK Logistics (UK) Ltd [2011] 4 All ER 539; *Ratnam v Cumarasmy* [1964] 3 All ER 933; *CM Van Stillevoldt BV v EI Carriers* [1983] 1 All ER 699, cited.

Bahadur Ali and Others v Ilaitia Boila and Others (unreported civil appeal No 30 of 2002 delivered on 5 September 2002); *Eroni Waqaitanoa v The Commissioner of Prisons* [1980] FCA 52; [1997] 43 FLR 245; *Pilkington v Wood* [1953] BI, followed.

K. Kumar for the Applicant.

S. D. Turaga for the First Respondent

Calanchini AP. This is an application by the Applicant for an order extending the time to appeal from a judgment of the High Court (Wickramasinghe J) at Lautoka delivered on 18 February 2011.

The application was made by Summons filed on 1 July 2011 and was supported by an affidavit sworn by Usha Kumar on 30 June 2011. An answering affidavit sworn by Ajay Singh on 14 March 2012 was filed on behalf of the First Respondent (the State).

The background facts may be stated briefly. The State had entered into a written tenancy agreement with the owner of premises situated at Lot 8 Valeta Street Lautoka. At some stage thereafter the Applicant purchased the premises. At the expiration of the fixed term tenancy, there continued in existence a monthly periodic tenancy agreement between the State and the Applicant.

The Second Respondent at some time entered into occupancy of the premises as a civil servant. The State paid the monthly rental of $600.00. The Second Respondent's employment with the civil service was terminated on 1 March 2001. However he continued to occupy the premises without the permission of the First Respondent. The First Respondent continued to pay the rent until it served a notice of termination which became effective on 30 November 2001. The Second Respondent was still in occupation at that time and continued in occupation until December 2004. The First Respondent paid no rent after 30 November 2001 although the Second Respondent did not vacate the premises until 2004. The First Respondent had informed the Applicant that it should deal directly with the Second Respondent on 28 February 2002.

The Applicant commenced an action in the High Court at Lautoka on 20 July 2005. This was some seven months after the Second Respondent had vacated the premises. The Applicant claimed that the State had breached a term of the monthly tenancy by failing to deliver vacant possession and the keys on and from 30 November 2001 and leaving the premises in a state of neglect and disrepair. The Applicant claimed special damages from both Respondents for loss of rental from December 2001 and for the cost of repairs to the premises. The Applicant also claimed general damages, interest and costs.

The learned trial Judge held that the State was under an obligation to hand over vacant possession to the Applicant when the State terminated the monthly tenancy with effect from 30 November 2001. Its failure to do so was a breach of the implied term of the monthly tenancy.

On the question of damages for loss of rental, it was not disputed that the tenancy had been terminated with effect from 30 November 2001. No rent was paid from 1 December 2001. The learned judge awarded special damages of $7800.00 as loss of rental for the period 1 December 2001 to 31 December 2002 at $600.00 per month plus interest at 6% from 1 December 2001 to the date of judgment.

The learned judge held that the Applicant was aware by the middle of 2002 that the First Respondent had closed its file on the matter. The judge was of the view that the Applicant could have made an application under section 169 of the Land

Transfer Act to recover possession of the premises. The Judge noted that the Applicant waited until the Second Respondent had left the premises on his own thereby letting damages accrue against the State. As a result the Applicant had failed to mitigate the loss and could only recover special damages from 1 December 2001 to the middle of 2002 together with a further reasonable period for loss of income whilst eviction of the Second Respondent was effected which was assessed as six months.

The learned Judge refused to award any seem for general damages as the Applicant had failed to take any steps to mitigate the loss. The claim for special damages for cost of repairs was not pursued at the trial.

The Applicant's proposed notice of appeal seeks an order that part of the judgment dealing with the award of damages be set aside. The Applicant seeks a further order that the Court of Appeal assess and award to the Applicant against the Respondents mesne profits for the period 1 December 2001 to 23 December 2004 being a period of 36 months. The application is made on the following proposed grounds of appeal:

'1. The learned judge erred in law in not awarding to the Appellant mesne profits for the entire period of 36 months of the 2nd Respondent's occupation of the Appellant's premises from 1 December 2001 to 23 December 2004 against the 1st Respondent and/or 2nd Respondent.

2. The learned judge erred in law by holding that the Appellant had not mitigated his damages by taking out eviction proceedings against the 2nd Respondent when:

a) that was not an issue raised in the pleadings or during the hearing or in the 1st Respondent's submissions; (b) the 1st Respondent as tenant was obliged to give to the Appellant as landlord vacant possession of the premises at the expiry of the term and it was for the 1st Respondent (and not the Appellant) to remove its employee from the premises, if necessary, by eviction proceedings.

c) the 1st Respondent could not absolve itself of its legal obligation to give vacant possession to the Appellant by merely advising the Appellant that it did not intend to take action against the 2nd Respondent to vacate the premises.

3. The learned judge erred in law in reducing the damages by holding that the Appellant could have obtained an eviction order against the 2nd Respondent within 6 months when:

i) such holding was pure speculation and not supported by any evidence whatsoever; and

ii) the issue of such reduction of damages was not raised by the Respondents.'

The application in this case was filed about four and a half months after judgment was delivered. Judgment was delivered on 18 February 2011 and the summons was filed on 1 July 2011. This Court has the power to extend the time for appealing. Section 20 (1) (b) of the Court of Appeal Act Cap 12 (the Act) provides that a judge of the Court may exercise the power of the Court to extend the time within which a notice of appeal may be given.

In *Bahadur Ali and Others v Ilaitia Boila and Others* (unreported civil appeal No 30 of 2002 delivered on 5 September 2002) Reddy P observed at page 7:

'The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles _ _ _. The onus is on the Appellants to satisfy the Court that in the circumstances, the justice of the case requires that they be given the opportunity to attack the order _ _ _. The following factors are normally taken into account in deciding whether to

grant an extension of time: (1) The length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time is extended and (4) prejudice to the Respondent.'

However before proceeding to consider the four factors identified by Reddy P in the **Bahadur Ali** decision (supra), it is appropriate to consider the importance of complying with the Rules of this Court.

In *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935 the Privy Council noted:

'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 could defeat the purpose of the rules which is to provide a time table for the conduct of litigation.'

On that point it is appropriate to recall the warning given by Griffiths LJ in *CM Van Stillevoldt BV v EL Carriers Inc* [1983] 1 All ER 699 at 703:

'It cannot be overstressed that adherence to the timetable provided by the rules is essential to the orderly conduct of business in the Court of Appeal. _ _ _ and I take this opportunity now to warn the profession that the attitude of the Court to the previous lax practices is hardening in order to ensure for the benefit of all litigants that the business of the Court of Appeal is conducted in an expeditions and orderly manner.'

Turning then to the length of the delay. The Applicant filed a summons for an extension of time on 1 July 2011. This was some 130 days (4½ months approx.) after the date of delivery of the judgment. Pursuant to r 16 the notice of appeal was required to be filed, in the case of a final judgment as this undoubtedly was, within 42 days. The time for filing expired on 1 April 2011. As a result the application has been filed about 90 days or about 3 months out of time.

In *Tevita Fa v Tradewinds Marine Ltd and Another* (unreported civil appeal No 40 of 1994 delivered 18 November 1994) Thompson JA at page 3 said:

'***The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short period but time limits are set with the intention that they should be observed and even lateness of only four days requires a satisfactory explanation before an extension of time can properly be granted.'***

In my judgment where there is a short delay in making an application and where that short delay is fully and satisfactorily explained, then the Court's discretion is unlikely to be exercised on the side of refusing an extension of time, unless an extreme lack of merit justifies such a refusal. However where the delay is much longer and where the explanation for the delay is not wholly excusable, then the Applicant will need to establish much more merit for the court to exercise the discretionary balance in his favour. (See **Norwich &** *Peterborough Building Society v Steed* [1991] 2 All ER 880)

It is certainly necessary to examine the reasons for a delay of some 90 days. The reasons for the delay are set out in paragraphs 7 to 10 of the affidavit in support. The reasons essentially relate to professional and personal commitments of the principal of the firm in part and on the failure of an associate legal practitioner to follow instructions during that period. However even after the return of the principal to the practice on 16 May 2011, the client's instructions were not obtained until 17 June 2011. There was no explanation in the affidavit

for that delay of one month. Even after instructions were obtained it took a further 14 days to file the application for an extension of time. There was no explanation provided for that delay.

In respect of the explanation that was offered for the period 18 February 2011 up till 16 May, it is noted that the principal of the firm was in New Zealand between 16 April and 16 May 2011 for '*personal reasons*.'

In my judgment the length of the delay between the period 16 May and 1 July 2011 is totally unsatisfactory and there has been no attempt to explain it. As for the period from 18 February to 16 May 2011 I consider that the observations of Pathik J in *Eroni Waqaitanoa v The Commissioner of Prisons* [1980] FCA 52; [1997] 43 FLR 245 have much merit. Pathik J at page 248 observed:

'First of all, Court is not concerned with the manner in which Counsel runs his practice, but he does owe a duty to his client to act diligently and not come up with the type of reasons advanced and expect the Court to grant him an indulgence.'

Notwithstanding the length of the delay and the wholly unsatisfactory explanations advanced on behalf of the Applicant, the exercise of the discretion does also depend upon a consideration of the merit of the proposed appeal. As Thompson JA in the **Tevita Fa** decision (supra) at page 3 stated:

'However as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.'

The grounds of appeal are concerned with (a) the refusal by the learned Judge to award *'mesne profits'* for the period 1 December 2001 to 23 December 2004, (b) the finding made by the learned Judge that the Applicant had not mitigated his damages by commencing eviction proceedings and (c) the reduction made by the learned Judge of special damages awarded to the Applicant on account of his failure to obtain an eviction order.

The starting point for considering of the merit of the appeal is the decision of the Court of Appeal in *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] 4 All ER 539. The Applicant submitted that the First Respondent was required to deliver vacant possession of the premises on 1 December 2001 to the Applicant. In support of what vacant possession meant, the Applicant relied upon the observations of Rimer LJ at page 551:

'The concept of vacant possession in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give 'vacant possession' on completion. It means that at the moment that 'vacant possession' is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property.'

Certainly the learned judge in the present case was clearly of the view that the First Respondent had not delivered vacant possession to the Applicant upon the tenancy having been terminated with effect from 30 November 2001. There was no doubt that although no longer an employee of the First Respondent, the Second Respondent was in occupation on that date and remained in occupation till 23 December 2004.

The issue between the parties in this application is more concerned with (1) what, if any, are the obligations of the Applicant to mitigate his loss and (2) whether the issue of mitigation, in whatever form, should be pleaded before it can be considered by the court.

The question of mitigation did not arise in the **Ibrend Estates** decision (supra). In that case the tenant and its workmen were required to deliver up vacant possession of a warehouse on 3 April 2009. However the tenant's workmen remained in the warehouse until 9 April 2009 a period of overstay of only 6 days. In the present case the failure on the part of the First Respondent to deliver up vacant possession was for a period of some three years from 1 December 2001 to 23 December 2004.

The decision in *Pilkington v Wood* [1953] Ch 770 is authority for the generally accepted proposition that *'the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party'* (per Harman J ibid at 777). However, 'the classic **Pilkingtonv Wood** (supra) is becoming interpreted as being concerned with the need to embark only on complex, difficult and uncertain litigation (See: **McGregor on Damages**, 17th Edition para 7.077)

As a result it may now be argued that a plaintiff has not taken all reasonable steps to mitigate the loss sustained if it can be shown that he would have no greater difficulty in establishing a right against a third party than in establishing liability against the Defendant.

In my judgment this is a situation in which it was reasonable to expect the Applicant to mitigate his damage by commencing proceedings under section 169 of the Land Transfer Act and to exhaust that remedy before considering commencing the present proceedings against the State for unpaid rent following the failure to deliver vacant possession and for any costs incurred in the eviction proceedings (See **Walker v Geo H Medlicott & Son (a firm)** [1999] 1 WLR 727).

The learned judge appears to have considered this matter on page 15 of the judgment. In paragraph 34 the judge stated:

'The Plaintiff could have conveniently initiated eviction proceedings in terms of section 169 of the Land Transfer Act.'

The procedure under section 169 of the Land Transfer Act is a summary procedure before a judge in chambers. As registered proprietor of the premises the Applicant could not reasonably be said to be making an application that was complex, difficult or uncertain.

I have therefore concluded that the chances of the appeal succeeding on this ground are weak.

On the question of pleading, it must be noted, first of all, that the onus of proof on the issue of mitigation is on the defendant. However under O 18 r 7 (1) (b) the defendant need not plead matters in mitigation of damage unless those matters are likely to take the plaintiff by surprise or raise new issues of fact.

Although the English Rules of the Supreme Court were amended in 1989 by the introduction of r 12 (1) (c) to O 18 requiring mitigation to be pleaded in all cases, the current Rules of the High Court do not contain such a provision. Furthermore the position in this jurisdiction appears to be governed by O 18 r 12(4) which states:

'Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.'

This rule applies to all claims for damages, whether special or general. The proviso is of course, that in the case of special damages, there will be no issue in dispute unless the Plaintiff has pleaded and particularised his special damages. Apart from this requirement so far as the present appeal is concerned, matters that relate only to damage and damages are not relevant for the purposes of pleading. In fact the First Respondent could not and need not plead to damages. All it was required to do was to dispute them.

It is apparent, as a result of the above comments, that in respect of the second ground of appeal the chances of success could not be described as good let alone strong.

The conclusion is that the appeal in general does not have sufficient merit to justify granting leave when the delay was extensive and the explanations were not excusable. The appeal does not raise any significant question of law or matter of public importance which in the interests of justice should be considered by the full Court of Appeal.

As a result the application is dismissed and Applicant (intended appellant) is ordered to pay the costs of the application fixed at $1800.00 to the First Respondent by 27 April 2012.

Order

[1] Application is dismissed.

[2] Applicant to pay costs of $1800.00 to the First Respondent by 27 April 2012.

Application dismissed.