

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Civil Appeal Jurisdiction)

Civil Case No.21 of 2002

**IN THE MATTER OF A Civil Appeal from the
Supreme Court of the Republic
of Vanuatu**

BETWEEN: JEFFREY ARU
Appellant

AND: VANUATU BREWERY LIMITED
Respondent

Coram: *Hon. Justice Bruce Robertson*
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver Saksak

Counsels: *Hillary Toa for the Appellant*
Mark Hurley for the Respondent

Hearing Date: *30th October 2002*

Judgment Date: *1st November 2002*

JUDGMENT

The appellant seeks leave to appeal out of time against the judgment of Coventry J. delivered on 12th November 2001 which refused an extension of time under Section 15 of the Limitation Act to bring proceedings against the respondent for bodily injury allegedly suffered by him in an employment accident.

In 1994 the appellant was an employee of the respondent. He alleges he suffered a serious right wrist injury when a bottle



exploded in the respondent's factory on 6th December 1994. There is a dispute about the seriousness of the injury suffered by the appellant and whether he took any time off work after the injury occurred.

When this appeal came on for hearing the appellant sought leave to adduce fresh evidence. The Court agreed to read an affidavit from Ms. Kirsty Davis. The affidavit provides evidence that supports the appellant's allegations that he suffered a cut to his right wrist on the day of the accident that required four stitches at the Vila Central Hospital, and it resulted in Nurse Davis giving the appellant a certificate to be absent from work for two weeks. The leave records of the respondent that were proved before Coventry J. however, do not show that any time was taken off work by the appellant.

Whatever the position may have been in the two weeks following the incident, the appellant then worked without any further time off because of the injury until he was dismissed from his employment on 14th December 1998. It was not until after his dismissal that the applicant made any formal complaint about the circumstances in which his injury occurred or any claims for compensation. He commenced that process shortly after his dismissal.

On 25th March 1999 the appellant issued a Writ of Summons claiming damages against the respondent. He alleged that he had suffered severe disability in his right wrist in consequence of the accident. The Writ was issued more than 15 months outside the three year time limit imposed by Section 3 (1) of the Limitation Act for proceedings of this kind.

A defence pleading the time limit was filed on 6th January 2000, although the question of the time limit had been raised between the parties in September 1999.

On 26th June 2000 the appellant filed an application under Section 15 of the Limitation Act for leave to proceed out of time.



On 7th September 2000 Marum J. heard the application including oral evidence from and cross-examination of the appellant. He granted an extension of time. The respondent appealed. The Court of Appeal in a judgment delivered on 22nd December 2000 in Civil Appeal Case No. 8 of 2000 allowed the appeal and returned the matter to the Supreme Court to be re-heard, as Marum J. had not addressed the requirements of the proviso to Section 16 (3) of the Limitation Act.

Section 16 (3) provides:-

“(3) Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient –

(a) to establish that cause of action, apart from any defence under subsection (1) of section 3; and

(b) to fulfill the requirements of subsection (3) of section 15 in relation to that cause of action;

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 3. (emphasis added)

The matter came on for re-hearing before Coventry J. Evidence was led by affidavit and orally from witnesses called by both the appellant and the respondent at hearings on 16th August 2001 and 16th October 2001. In a reserve judgment delivered on 12th November 2001 Coventry J. refused the appellant an extension of time within which to bring his claim for damages, and the action which had already been commenced was dismissed.



The appellant failed to lodge a notice of appeal within the 30 day period prescribed by the Court of Appeal Rules within which an appeal to this Court must be commenced.

It was not until 15th October 2002, some 11 months after Coventry J. delivered his decision, that the appellant took any action in the Court to institute an appeal. On that day he filed an application for extension of time to appeal. In a supporting affidavit the appellant said that the delay in instituting an appeal was because he could not raise the VT10,000 filing fee. He said that the prospect of appealing only became possible when a family member recently offered to lend him the filing fee. No notice had been given to the respondent in the meantime of the appellant's intention to appeal if and when he could raise the necessary fees.

The application for an extension of time within which to appeal was refused on 18th October 2002. His Lordship said:-

"I refuse the application. This whole case has been punctuated by delay on the part of the applicant. I accept it is very difficult to save money for a person in the position of the applicant, especially with the apparent injury described in the medical report. However, I find the delay was too long. Further, taking into account what the applicant said orally during the application, I find he has not done all he reasonably could to raise the funds for an appeal. No application was made to the Court of Appeal to waive part or all of the fee."

The appellant has now applied to this Court for leave to appeal out of time against the order made on 12th November 2001.

The appellant's delay in seeking to appeal the order made on 12th November 2001 was considerable, and having regard to Coventry J's finding on the evidence that the appellant has not done all that he reasonably could do to raise the funds for an appeal, the appellant faces a formidable task in persuading this Court that it should take any different view about granting an extension of time to appeal.



The time limit for bringing an appeal from a final decision is imposed to bring about finality between the parties. Before the time limit will be extended the proposed appellant has to show an acceptable excuse for the delay, and the Court must be satisfied that there is arguable merit in the proposed appeal. The power to extend time is discretionary. In the usual case, the stronger the prospects of the appeal succeeding, the more likely it is that the Court will exercise its discretion in favour of extending time. The Court will also be influenced by the length of the delay and the explanation for it. Speaking generally, the longer the delay, the less likely it is that the Court will extend time. In addition, the Court must consider the position of the respondent, and in particular the extent of any prejudice that the respondent may suffer if time is extended.

As we have observed the delay in the present case is substantial and the explanation for the delay is not entirely satisfactory. In these circumstances, we do not think that the discretion to extend time should be exercised in favour of the appellant unless he can demonstrate that his proposed appeal has a clear and strong chance of success.

The proposed appeal concerns the correctness of the decision by Coventry J. not to grant an extension of time within which to commence proceedings pursuant to Section 15 of the Limitation Act. As the Court of Appeal pointed out in its decision, for the appellant to qualify for such an order he must fulfill the requirements of Section 15, and also the requirements of the proviso to Section 16 (3).

To qualify for an extension of time under Section 15, it was necessary for the plaintiff to show that "*material facts*" which were or included "*facts of decisive character*" were outside his knowledge (active or constructive) until after three years from the accident. On the evidence adduced before him, Coventry J. held that these requirements were not fulfilled. In particular he held that the plaintiff on his own evidence knew that there was an injury at work, he knew the extent of that injury, and



he regarded throughout that his employer was liable to pay compensation. The material facts which were of a decisive character for the purpose of bringing proceedings were therefore known to him. Under Section 20 of the Limitation Act, a fact shall, at any time, be taken to have been outside the knowledge actual or constructive of a person if, but only if, he did not know that fact, and in so far as it was capable of being ascertained by him, he had taken all such action, if any, as was reasonable for him to have taken for the purpose of obtaining appropriate advice. In this case the relevant facts were known to the applicant and, more over, Coventry J. held that the plaintiff had not shown that he had taken the steps which any reasonable person would have taken in the circumstances to obtain advice regarding the prospect of success in the action.

In the course of his reasons, Coventry J. noted that there was a substantial dispute between the appellant and the respondent and its witnesses as to whether the injury alleged by the appellant had in fact occurred. His Lordship noted that there was no sick note nor any record of an attendance at the hospital. The fresh evidence produced to this Court in the affidavit of Ms. Kirsty Davis now shows that there is evidence of an attendance at the hospital. However, that addition to the evidence makes no difference to the reasoning of Coventry J. which led him to refuse the extension of time. As we understand the reasons of Coventry J., he accepted that the applicant had suffered an injury that required four stitches. The Judge's reasons for refusing an extension of time were based upon the appellant's own evidence which included his description of his attendance at the hospital. As the judge pointed out, the facts upon which the appellant sought to base his action were known to him, even if they may not have been made known to the employer.

Finally, Coventry J. held that the proviso to Section 16 (3) had not been met. His Lordship found that it could not have been outside the plaintiff's knowledge that his claim was out of time until after the commencement of the action.

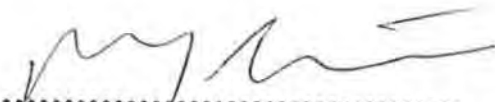


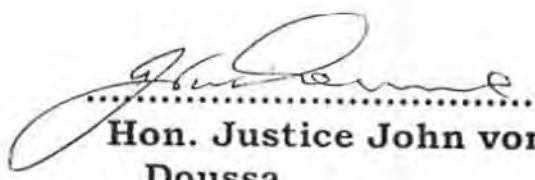
In our opinion the findings of Coventry J. were plainly open on the evidence that was before him. Indeed we think the evidence in favour of his findings was overwhelming. In these circumstances we do not think that the proposed appeal which the appellant seeks to bring against the refusal to extend time under Section 15 of the Limitation Act has any prospect of success.

In these circumstances we consider that leave to appeal out of time should be refused, and the Court orders accordingly. Mr. Aru must pay the costs of Vanuatu Brewery Limited of and incidental to the present application to this Court.


Dated at Port Vila, this 1st day of November 2002.

BY THE COURT


.....
Hon. Justice Bruce Robertson


.....
**Hon. Justice John von
Doussa**


.....
Hon. Justice Daniel Fatiaki


.....
**Hon. Justice Oliver
Saksak**

