14th APRIL 1986

1986/7
55

IN THE COURT OF APPEAL

V.A. Tomes, Esq., Deputy Bailiff
(Single Judge)

Between	**A.C. GALLIE LIMITED**	Appellant
And	**W.H. DAVIES**	First Respondent
And	**T.O.P. WALKER**	Second Respondent

Advocate G.R. Boxall for the Appellant
Advocate R.J. Michel for the First Respondent
Advocate G. Le V. Fiott for the Second Respondent

This is an application by the Appellant for an enlargement of time under Rule 16(1) of the Court of Appeal (Civil) (Jersey) Rules, 1964, within which to lodge the Appellant's case.

The Appeal is on one point only, namely the decision on the 26th February, 1985, that the date as at which damages should be assessed is the 31st day of December, 1976.

The Appellant wishes to ask the Court of Appeal to order that the relevant part of the judgment be set aside and that damages should be assessed as at July, 1981.

The First and Second Respondents cross-appeal so as to ask the Court of Appeal to order that the said part of the judgment be set aside and that damages should be assessed as at 31st January, 1973.

This application is yet another step in a protracted saga of litigation which commenced in 1970 when the Second Respondent sued the Appellant for the retention money under a building contract relating to the Appellant's building at Rue des Pres. In 1974 the Appellant brought an action, by Order of Justice, against the First and Second Respondents, the architect and builder respectively and, on the 3rd March, 1976, the action by the Second Respondent against the Appellant and the Appellant's action against the First and Second Respondents were consolidated.

The hearing/....

The hearing of the action commenced on the 8th March, 1976, and terminated on the 15th November, 1976; but judgment on liability was not given until the 11th October, 1977. All the parties appealed to the Court of Appeal and judgment was given in April, 1981.

Finally, the matter came before the Court again in February, 1985, when there were two issues before the Court. Firstly, when should the Appellant have put in hand the remedial works - it would follow that that would be the appropriate date at which damages should be assessed; and secondly, whether the Second Respondent should have had the opportunity of carrying out the remedial work which was his responsibility. Judgment was given on the 26th February, 1985. The decision on the second of the two issues is not appealed against.

The relevant part of Rule 16(1) is in the following terms: "The Court or a judge thereof shall have power to enlarge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, on such terms (if any) as the justice of the case may require ....."

The Rule is in similar terms to Rule 5(1) of the Rules of the Supreme Court, Order 3, which is in the following terms: "The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings".

My attention was drawn to page 15 of the "White Book" and, in particular to the notes to Rule 3/5/1. The following extract contains a useful summary of the "old cases":

> "The object of the rule is to give the Court a discretion to extend time with a view to the avoidance of injustice to the parties (Schafer -v- Blyth (1920) 3 K.B. 143, p.143; Saunders -v- Pawley (1885) 14 QBD 234, p.237). "When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not

to be/....

to be listened to and any injury caused by delay may be compensated for by the payment of costs" (per Bramwell L.J. in Atwood -v- Chichester (1878) 3 QBD 722 p.723, C.A.) A special circumstance, however, such as excessive delay may induce a Court in its discretion to refuse to extend the time (per Jessel M.R., in Eaton -v- Storer (1882) 22 Ch. D. 91, p.92, C.A.)".

What may be described as the more modern approach is to be found in Revici -v- Prentice Hall Incorporated (1969) 1 WLR 157; (1969) 1 All ER 772, C.A.). In that case, which related to libel proceedings, it was agreed that the plaintiff should have six weeks to consider whether to appeal against the refusal of the master to grant leave to serve out of the jurisdiction and this was extended a further five weeks; subsequently, four weeks after the court extension had expired, the plaintiff served his notice of appeal. The judge refused to extend the time for appealing. The Court of Appeal held that there would be no extension of the time to appeal because (i) the rules of the court must be observed and it mattered not that the plaintiff had offered to pay the costs and that no injustice would be done to the other side and (ii) if there was non-compliance with the rules it must be explained; and (per Edmund Davies, L.J.) prima facie if no excuse was offered no indulgence should be granted (page 772).

Lord Denning M.R. delivered the first judgment in that case and I quote (commencing at the foot of p.773):

"There is a very general power in the court to extend the time, under R.S.C., Ord. 3, r.5, whenever the court thinks it just to do so. Counsel for the plaintiff has urged before us today that when the time is not excessive - and he says it is not in this case; it is only a month since the last extension - and where there is not injustice done to the other side (to the defendants, in this case), then, on payment of costs, the time ought to be extended for the plaintiff to appeal.

"Counsel for the plaintiff referred us to the old cases in the last century of Eaton -v- Storer and Atwood -v- Chichester and urged that time does not matter as long as the costs are paid. Nowadays we regard

time very/....

time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had 3 1/2 months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more".

Edmund Davies, L.J. (at page 774) added this: "..... the rules are there to be observed, and if there is non-compliance (other than a minimal kind) that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted: see Ratnam -v- Cumarasamy, per Lord Guest.

"That as it seems to me, is the position here. Substantial delay has occurred, and simply no explanation for it has even now, in my judgment, been proffered. In these circumstances it seems to me impossible to say that Eveleigh, J., was not entitled, in the exercise of his discretion, to refuse the extension asked for ...."

Ratnam -v- Cumarasamy was a decision of the Judicial Committee of the Privy Council, reported at (1964) 3 All ER 933 and thus demands particular attention. In that case the time allowed for the filing of the record of appeal had expired, before an extension of time was applied for. The explanation given by the appellant was that he had not instructed his then solicitors until the day before the time for filing the record of appeal expired and that he had not done so earlier, or taken any other action with regard to the appeal, as he had hoped that some compromise might be reached between the parties. The Court of Appeal (of Malaya) dismissed the application.

Lord Guest/....

Lord Guest, who delivered the judgment of the Judicial Committee (at p.935) had this to say:

> "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. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for the delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle.
>
> "The principle for which the appellant's counsel contended was that the application should be granted unless to do otherwise would result in irreparable mischief. This was said to be extracted from the judgment of Bramwell, L.J. in Atwood -v- Chichester (Lord Guest then quoted Bramwell, L.J., which I have done already in the extract from the "White Book"). Their Lordships note that these observations were made in reference to a case where the application was to set aside a judgment by default, which is on a different basis from an application to extend the time for appealing. In the one case the litigant has had no trial at all; in the other he has had a trial and lost. Their Lordships do not regard these observations as of general application".

My attention/....

My attention was also drawn to two Jersey cases. The first of these is Jersey Demolition Contractors -v- The Resources Recovery Board (27th June 1985 - as yet unreported). In that case an identical application was refused. However, there had been a delay of two and a half years in complying with the requirements of Rule 8 of the Court of Appeal (Civil) (Jersey) Rules, 1964, which requires the "Appellant's Case" to be lodged with the Greffier and the Respondent before the expiration of four months after the day on which the Appellant has received from the Greffier the copy of the transcript. The learned Bailiff, at page 8 of his judgment, said that: "My understanding of the view adopted by the English Court of Appeal when considering an application for an extension of time is that if there has been excessive delay and no explanation (or no adequate explanation) has been given, then the Court will not normally grant an extension of time, and in any event, in exercising its discretion, will not take into account the merits or importance of the issues which are the subject of the appeal". I respectfully concur.

The other Jersey case was that of Waring -v- Holderness and Crane (9th December 1985 - as yet unreported). In that case the learned Bailiff said, at page 1, that: "what is clear is that prima facie the rules as to the time-table of the appeal procedure are there to be observed and there must be solid grounds to justify a variation".

At page 2 the learned Bailiff sought to summarise the test to be applied in the following way: "The two questions which I have to ask myself are: first, how substantial are the grounds for seeking a further delay? and secondly: what prejudice would be caused to the Appellant if the Respondent were to be granted a further delay?" Having considered all relevant matters the Bailiff decided to grant the Respondent an extension of time of two months, to date from 2nd December, within which to file the Respondent's case and affidavits in reply to those filed on behalf of the Appellant.

For my part I do not find it very difficult to reconcile the several cases:-

The object/....

1) The object of the rule is to give the Court a discretion to extend time with a view to the avoidance of injustice to the parties. It is a very general power in the Court to extend time whenever the Court thinks it just to do so.

2) Excessive delay may induce the Court in its discretion to refuse to extend the time. This principle, enunciated by Jessel M.R. in Eaton -v- Storer is effectively the same as was applied by Sir Frank Ereaut in Jersey Demolition Contractors -v- The Resources Recovery Board.

3) There must be a sufficient explanation of the delay to justify an extension of time. In Revici -v- Prentice Hall Incorporated not a single ground or excuse was put forward to explain the delay. This was described by Lord Denning M.R., as "important". Edmund Davies L.J. added that if there is non-compliance that is something which has to be explained away. That is consistent with an exercise of discretion to extend time with a view to the avoidance of injustice. An appellant who gives no explanation can hardly expect discretion to be exercised in his favour. To the extent that Bramwell L.J. may have said something different in Atwood -v- Chichester, that case is to be distinguished.

The crux of this matter, therefore, is that I have to decide whether, in all the circumstances of the particular case, and in the exercise of my discretion, it is just to enlarge the time as requested. As Lord Guest said in Ratnam -v- Cumarasamy there must be some material on which the Court can exercise its discretion; and it is entirely a matter of discretion whether or not the material advanced is sufficient to justify an extension of time.

Although judgment was given on the 26th February, 1985, the transcript did not become available until the 18th September, 1985, from which time the four month period for filing the Appellant's case began to run. The transcript contained 263 pages.

There were two limbs to the explanation for the delay. An Opinion was sought from Counsel in England on receipt of the judgment. The Opinion was received with the rider that it was prepared without benefit of the transcript. On receipt of the transcript it was copied and sent off for a further

Opinion/....

Opinion. Throughout the "protracted saga" Messrs. Viberts had acted as legal advisers to the Appellant, more latterly Advocate Le Quesne of that firm. It was with Mr. Le Quesne's approval and advice that English Counsel's opinion was sought. English Law had a greater wealth of authority and Mr. Le Quesne felt that a fresh mind should look at the situation. Mr. Boxall argued that it was a correct decision and the correct procedure to obtain an Opinion. Counsel's Opinion arrived on the 5th February, 1986.

Mr. Michel, for the First Respondent, argued that all Jersey advocates are admitted as both Barristers and Advocates, that they are all qualified in the law of England as well as the law of Jersey, that they are expected to be knowledgeable, that ignorance cannot be excused, that Counsel's Opinion is a luxury and not a right and that it was not the proper exercise of a Jersey Advocate's function to seek to rely as an explanation for delay upon the obtention of an Opinion from another jurisdiction. Mr. Fiott, for the Second Respondent, supported that argument and made the additional point that where a defendant has to file an answer to an action within twenty-one days there is no delay allowable to obtain Counsel's Opinion on matters of Jersey Law. Mr. Michel also made the point that English Counsel's costs were not allowed on taxation unless it was reasonable under all the circumstances to seek that advice.

For my part, I am not prepared to condemn the obtention of English Counsel's advice. I am aware of the considerable pressures under which members of the legal profession in Jersey operate. I can appreciate the desire to obtain specialist advice from those with particular expertise and the question of costs is quite another matter. I am not saying that if this ground stood alone it would necessarily persuade me to exercise my discretion in favour of the Appellant but it is a factor to be taken fully into account.

The other, and more important reason, is the change of Counsel. Towards the end of 1985 relations between Mr. Le Quesne and Mr. Brian Barette, the beneficial owner of the Appellant, began to falter. Neither of them were to blame but it was a sad fact that after an association of fifteen years Mr. Barette felt that a new adviser was desirable. Matters came to a head on the 19th December, 1985, when on a telephone call from Mr. Barette's

solicitor, Mr. Boxall agreed to act. He had already arranged a holiday over the Christmas period and it became quite clear that he could not do justice to the case in the time remaining. Accordingly, he sought a delay which was refused and proceeded to apply to the Court by summons.

Counsel for the Respondents complain of the late change of Counsel by the Appellant, when three quarters of the time allowed had already expired, and of the acceptance by Mr. Boxall of the appointment in the knowledge of his holiday and other commitments. It was not suggested that Mr. Le Quesne had dismissed himself or refused to act; here it was entirely the actions of the Appellant, the free choice of Mr. Barette to seek other Counsel, that caused a delay entirely of his own making.

It appeared to me that Counsel for both Respondents dwelt overmuch on the delays that had taken place in the past. There are two aspects to past delay. On the one hand, all litigation must have an end and the total delays in this protracted saga have been much too long already. On the other hand there has been so much delay already that a little more will not really make much difference. It is not on the basis of such considerations that I make my decision but on the basis of that which I consider just in the present circumstances of the case. I have to accept that there was a mutual severance of the relationship between Mr. Barette and Mr. Le Quesne, probably with neither at fault, and that there was no longer the degree of trust and confidence that a counsel/client relationship depends upon. Again, it is important, in such circumstances, that the Appellant should be represented and I do not criticise Mr. Boxall in any way for agreeing to act.

In all the circumstances I am satisfied that the Appellant has 'explained away' the delay sufficiently to justify an extension of time and that there has not been, in connection with the present appeal, such excessive delay as to induce me to refuse to extend the time.

I now/....

I now have to consider whether the prejudice to the Respondents is such that I should nevertheless refuse an extension of time. In my opinion it is not. The case is solely about damages. The Repondents could have made prudent provision for the damages that they may have to pay; interest may be running against them but they have not been parted from their money. There is, I accept, a degree of personal hardship but a short extension of time will not aggravate this seriously. Moreover, the Respondents have cross-appealed and will have the opportunity of prosecuting those cross-appeals to their possible advantage.

In all the circumstances of the case, I exercise my discretion in favour of the Appellant and I extend the time within which the Appellant must lodge with the Greffier and with the Respondents copies of certain documents, including the Appellant's case until the 18th April, 1986.

Finally, I acknowledge that the Respondents have been inconvenienced, that no part of the delay in connection with the present appeal has been of their own making, and that they acted reasonably in opposing the application and urging a decision from a single judge. They should not now be penalised financially for a set of circumstances which lay wholly within the province of the Appellant and I order that the Appellant shall pay the First and Second Respondents' costs of this application on a full indemnity basis.