COURT OF APPEAL 71.

14th April, 1997

Before: Sir Peter Crill, K.B.E., Single Judge.

Between	(1) David Eves (2) Helga Maria Eves (née Buchel) (3) Richard Charles Eves	Plaintiffs/ Appellants
And	St. Brelade's Bay Hotel Limited	Defendant/ Respondent

IN THE MATTER OF an Appeal by the Plaintiffs from the Order of the Royal Court (Samedi Division) of 25th May, 1995, striking out their Order of Justice.

Application by the Plaintiffs, under Rule 16 of the Court of Appeal (Civil)(Jersey) Rules, 1964, for an extension of time within which to lodge with the Judicial Greffier the documents set out in Rule 8(1) of the said Rules.

The First Plaintiff on his own behalf,
and on behalf of the Second and Third Plaintiffs.
Advocate R. J. Michel for the Defendant.

JUDGMENT

CRILL, JA: This is an application by the Appellants for an extension of time within which to lodge their case with the supporting documents in an appeal brought by them against the judgment of the Royal Court of 25th May, 1995, striking out their Order of Justice. The appeal was lodged on 29th June, 1995, three days late, but as Mr. Michel has pointed out that could easily have been remedied by an application to the court for an extension of time and in the event no exception was taken by the Respondent company to the late filing of the appeal.

Under Rule 8(1) of the Court of Appeal (Civil) (Jersey) Rules, 1964 an Appellant is required to lodge within four months from the receipt of the transcript of the trial the case upon which he relies. Here there were no transcripts and accordingly Mr. Eves, who is conducting the case on behalf of both Plaintiffs, was told by the Assistant Judicial Greffier in a letter dated 29th June, 1995, which was confirmed by a further letter of 27th July, 1995, that the four month period would run from 29th June, 1995.

In his skeletal argument Mr. Michel for the Respondent suggested that Mr. Eves may in some way be in breach of the Loi (1961) sur

l'exercice de la profession de droit à Jersey which governs the exercise of the profession of law by qualified persons in this Island. Had that matter been pursued - which fortunately it was not - I would have found myself in the position of being unable to agree with Mr. Michel.

In the event the Appellants' case has not been lodged yet. I was told that the reason for this is that they were waiting until the outcome of this application before doing so. That submission is borne out to some extent by the correspondence in the autumn of 1995 where, in a letter of 4th December for example, the word "relaunch" is used in respect of this appeal but I will refer to the correspondence more fully in a moment.

The Plaintiffs' admit that the delay, as they put it, in their skeletal argument *"may be considered substantial"* but they justify it in two ways. First, the work involved in another case concerning Hambros Bank made it impossible to attend to the present case, let alone remember the Court of Appeal Rules. Secondly, in March, 1996, when the Plaintiffs were evicted from their property, which was subject to *dégrèvement* proceedings, all their papers were placed in one room. They also claim that they were deprived of their papers by the Attorneys appointed to conduct the *dégrèvement*. They say further in the skeletal argument that they *"had only recently become aware"* of the Rule requiring their case to be lodged. As regards that latter argument I reject it.

The background to this case may be summarised very briefly. A *désastre* was declared in respect of Blue Horizon Holidays Ltd in 1994. Subsequently, on 31st March, 1995, two Attorneys, Solicitors of this Court, were appointed by the Court to act as Attorneys in a *dégrèvement* on the immovable property of Mr. Eves and on his movable property.

It should be noted of course that in this action it is Mr. Eves who has brought the action against St. Brelade's Bay Hotel Ltd jointly with his wife and in his skeletal argument he has asked - but I have not been asked to rule on it - that I should authorise him to act for two other members of his family. This is not the appropriate moment for such an application, which should be made in the first instance to the Royal Court if the matter proceeds which depends on whether or not I am going to grant leave. It is not, in any event, a matter on which I have been addressed and therefore I do not make any ruling.

Another point which arose in the course of the hearing today - and it was touched on by Mr. Eves in his skeletal argument - was that he could not in any event, from the time the *réalisation* and discumberment of his property was ordered on 31st March, take any steps; however it is accepted that the case against St. Brelade's Bay Hotel - which had already been set down at the instance of the Respondent in order to argue that the Order of Justice should be struck out - would be allowed to continue. It does not appear expressly in any of the judgments but it was allowed to continue and in fact was argued in the Royal Court on 11th May, 1995, and judgment was handed down on 25th May. It is from that judgment, as I have said, that Mr. Eves has appealed and is now seeking my leave to extend the time within which to comply with Rule 8(1) of the Court of Appeal (Civil) (Jersey) Rules, 1964.

Following the order for discumberment and *réalisation* on 16th June, 1995, the *réalisation* was adjourned *sine die* or without fixing a date on the representation of the Attorneys.

On 7th July, the *dégrèvement* was concluded. On 1st September, 1995, the papers relating to St. Brelade's Bay Hotel which had been taken by the Attorneys - I pause for a moment to say that the only authority they had was to take photocopies of the papers but they appear to have taken the papers themselves, however that is not a matter for me to go into - were handed back to Mr. Eves.

On 27th October, 1995, the Bailiff ordered a stay of the *réalisation* pending an appeal to the Privy Council which on 18th December, 1995, rejected the Applicants' applications for a stay if not the setting aside of the *réalisation* and the *dégrèvement*.

Finally, on 12th January, 1996, at the request of the Attorneys, the *réalisation* was discharged. Mr. Eves, in addition to his other arguments, has submitted that he could not - no matter what the Rules said - take any steps whatsoever up to 12th January because he had no *locus standi*. He is supported in that submission by the decision in Barker -v- Barclays Bank plc (1st February, 1989) Jersey Unreported; (1989) JLR N.1. As it happened I was sitting as Bailiff at the time and I ruled (and as far as I am aware that ruling has not been over-turned) that a debtor subject to orders of *dégrèvement* and *réalisation* has no *locus standi* to bring an action in respect of a claim against another person, his right to do so being suspended until the final act of *dégrèvement*. In the meanwhile, the right is vested by Article 5 of the Loi (1904) (Amendement No. 2) sur la propriété foncière exclusively in the Attorneys appointed to conduct the proceedings and in the event that they decide not to pursue the matter the debtor is only entitled to seek the directions of the Court. I stress those last words "to seek the directions of the Court".

It seems to me from the correspondence that the question of being under a disability does not appear to have troubled the Applicant until 11th February, 1997. Whether - had he pursued the matter before the Courts - he would have been prevented from lodging his documents is highly problematical. He was, in effect, if my ruling in Barker is to be followed, unable to take steps as a result of his rights being suspended. But whether his right to institute an action whilst suspended covers subsequent procedural matters in a case which has been allowed to proceed by the Royal Court is something I find difficult to decide on. I have therefore decided to take the most favourable view I can of the Applicant's position and to say that the time certainly began to run undisturbedly and continually only on 12th January, 1996, that is to say some thirteen months previous to today.

I am satisfied, however, that in 1995 when Mr. Michel was not aware that the *dégrèvement* and *réalisation* were, by operation of law, preventing Mr. Eves from continuing - subject as I say to an argument which I am not concerned with as to whether it might have been possible for him to lodge the documents and still not be in breach of that Rule - he (Mr. Michel) wrote to the Assistant Judicial Greffier on several occasions to acquaint Mr. Eves with the necessity to lodge the documents, pointing out that if he did not do so then Rule 10 of the Court of Appeal Rules (Abandonment of Appeal by Non-Prosecution) would

be deemed to come into effect - indeed it might be argued that it already had done so. But because Mr. Eves is representing himself I take a less stringent view of that matter. He was obviously very much concerned with the other case with which he was dealing, namely Hambros Bank and his eviction. I now continue with the question of the law.

The law in matters of this sort is now well-established and I need not restate it in detail except to record the four matters to which a Court has to have regard: they are the length of the delay; the reasons for the delay; the chances of the appeal succeeding if an extension of time is granted; and the prejudice to the Respondent if the delay is granted.

As I have said, allowing for four months to run from 29th June, 1995, if I were to take the strict view, the time for lodging the Appellants' case expired on 29th October, 1995, and in fact Mr. Michel soon drew attention to that fact to Mr. Eves. The present application with which I am now dealing was not filed until 21st February, 1997. In a letter to the Assistant Judicial Greffier of 11th February, Mr. Eves says that he had regrettably overlooked the Assistant Greffier's letter of 29th June, 1995. Again, I find that difficult to accept.

Even if I were to accept the eviction from their home as some justification for non-compliance with Rule 8(1) of the Civil Appeal Rules - and I do not under-estimate the suffering and distraction that such an event can bring - and therefore attempting to allow some time for this, that still leaves a very substantial delay that has not been explained to my satisfaction. It is interesting to note that in Arya Holdings Ltd -v- Minories Finance Ltd (28th April, 1994) Jersey Unreported CofA, arguments were advanced in a much more complicated way which I need not set out. But there was a suggestion that a number of steps could not be taken by one of the parties until it had been put in possession of the necessary documents and information which were in the possession of the receivers. That is a parallel to the position here where Mr. Eves has said that he could not move, even if he had *locus standi* because the Attorneys had the papers, although they returned them, as I repeat, on 1st September, 1995. He said also that he could not find his papers because they were lumped together in one room when he was evicted in May, 1996. However, the Court of Appeal said this - referring to the question of not being able to take any action because the company (Arya) was not in possession of the necessary documents and information - at p.15:

> *"In my judgment* (that is to say the Judgment delivered by Sir Godfray Le Quesne) *this is misconceived. Periods of prescription do not cease to run in the absence of specific provision to that effect merely because a potential Plaintiff may not have all the information or documents needed to press home his cause of action. A patient wishing to sue a hospital may find himself prescribed unless he brought his action within the relevant prescriptive period even though all the relevant information and documents are held by the hospital. That is why in many jurisdictions special provision is made to extend the period of prescription in such cases or to give special rights of discovery of documents exercisable before or immediately after proceedings are begun".*

It seems to me that Mr. Eves took no steps whatsoever during the period in which he was not aware that he was prescribed. If he found himself in a difficulty because he could not get the documents, he could have applied to the Court for directions. It would have been interesting to see what the Court would have done if the question of absence of *locus standi* had been raised in the light of the fact that the Court appears to have permitted the continuation of the case now sought to be continued on appeal.

It ought to have been possible for the Appellants to have retrieved their papers in the time available from the one room assuming that the Attorneys did seize their papers, (which now appears to have been the case) although as I repeat they were only authorised to take photostat copies - it would not have been difficult to bring a representation to the Court asking for access at least to the papers relevant to this case.

In my opinion attending to one case, as the Appellants say they were, is not an acceptable excuse for neglecting to observe the procedural requirements of the Court of Appeal Rules with which Mr. Eves at least has a considerable acquaintance. Further it is incorrect to say, as I have mentioned, that the Appellants had only recently become aware of the provision of Rule 8(1). Mr. Eves was told about it twice 20 months ago before they issued the instant summons and on several occasions in the autumn of 1995, if not, indeed, in 1996 itself.

I have had the opportunity to read the judgment of the Court of Appeal handed down on Friday last in re Blue Horizon Holidays Ltd *en désastre* (11th April, 1997) Jersey Unreported CofA. In that judgment the Court deals very fully with Mr. Eves' complaint that he or his company had no notice of St. Brelade's Bay Hotel declaring Blue Horizon Holidays *en désastre*. The Court said that such a claim was misconceived. It pointed out that it was a debtor's duty to seek out his creditors and pay his debts on time. The evidence, the Court said, suggested not even a shadow of defence to the claims of the Applicant creditor.

Mr. Eves argued that the Royal Court misconstrued the rule in Foss -v- Harbottle (1843) 2 Hare 461; 67 ER 189, because it omitted to mention the judgment of the Royal Court in detail in Eves -v- Tourism Committee (4th October, 1993) Jersey Unreported. In fact that case applied Foss -v- Harbottle and struck out some of the pleadings in the Plaintiffs' Order of Justice. But even if the Appellants were able to persuade the Court of Appeal that they fell within one of the exceptions in Foss -v- Harbottle, in its judgment of last Friday the Court of Appeal said that Mr. Colley's motives in making the application through the Respondent company were ***"irrelevant and of no account".*** In any case I consider that the careful examination of the rule by the Royal Court cannot be fairly criticised.

In my opinion the chances of the appeal succeeding if leave is granted are very slight indeed. Nevertheless I have looked at Norwich & Peterborough Building Society -v- Steed [1991] 1 WLR 449 and I have to look at the merits if I can. What is actually said on p.455 is this:

> ***"The merits therefore played little part.*** (Lord Donaldson of Lymington MR was referring to the Palata case). *In* ***Rawasdeh***

-v- Lane the delay was very much longer - it was six weeks in fact - and was not wholly excusable. Much more merit was required to overcome it".

I find the reasons given for the delay to be somewhat specious. In my opinion no proper or sufficient excuse has been put forward for that delay which would entitle me to say that leave must be given and that being so the amount of attention which I have to direct to the merits is correspondingly slight. Adapting the words of Lord Donaldson considerably greater merit would have to be shown before that side of the equation would balance out the unacceptable delay.

As regards the prejudice to the Respondent it is time that this long affair came to an end. The Order of Justice imputes improper motives to Mr. Colley and that is something that if allowed to continue when the matter has been thoroughly ventilated in the Court of Appeal already, will cause further distress to Mr. Colley and his family.

As Mr. Eves attaches great importance to the omission from the Deputy Bailiff's judgment of a detailed reference to the Appellants' case against the Tourism Committee I ought to say some further brief words about it. That case is an example of the Court applying the rule in Foss -v- Harbottle, striking out passages in the Order of Justice, as I have just said, because it offended against the Rule. The remaining matters which were left over to be argued at the request of the Appellants' then counsel were not concerned with the Rule at all.

I have no hesitation in finding that the Royal Court examined the rule most carefully and cannot be criticised and there is little likelihood of their interpretation of the rule being overturned by the Court of Appeal.

Lastly, the Court of Appeal on Friday last said this:

"Mr. Eves may not believe it but he has been handsomely treated by the Royal Court throughout this long history....".

With that view I respectfully agree. The application is refused.

Authorities

Court of Appeal (Civil) (Jersey) Rules, 1964: Rules 8(1), 10, and 16(1).

Court of Appeal (Civil) (Jersey) Rules, 1969: Rule 10.

Hickman -v- Hickman [1987-88] JLR 53.

AC Gallie -v- Davies (14th April, 1986) Jersey Unreported; [1985-86] JLR N.2.

AC Gallie -v- Davies [1987-88] JLR 224.

Ratnam -v- Cumarasamy [1965] 1 WLR 8.

Jersey Demolition Contractors -v- Resources Recovery Board [1985-86] JLR 77; [1985-86] JLR N.2.

Van Stillevoldt BV -v- EL Carriers Inc. [1983] 1 WLR 207.

Revici -v- Prentice Hall Inc [1969] 1 All ER 772.

Barker -v- Barclays Bank plc (5th April, 1989) Jersey Unreported; [1989] JLR N.2.

Barker -v- Barclays Bank plc (1st February, 1989) Jersey Unreported; [1989] JLR N.

Waring -v- Holderness (9th December, 1985) Jersey Unreported; [1985-86] JLR N.7.

Arya Holdings Ltd -v- Minories Finance Ltd (31st March, 1992) Jersey Unreported.

Arya Holdings Ltd -v- Minories Finance Ltd (28th April, 1994) Jersey Unreported CofA.

Spencer Bower and Turner (2nd Ed'n 1969): "Res Judicata".

Loi (1961) sur l'exercice de la profession de droit à Jersey.

Haryanto -v- ED & F Man (Sugar) Ltd (27th February, 1991) Jersey Unreported.

Palata Investments Ltd -v- Birt & Sinfield Ltd [1985] 2 All ER 517.

Norwich & Peterborough Building Society -v- Steed [1991] 1 WLR 449.

Mallory -v- Butler [1991] 1 WLR 458.

Foss -v- Harbottle (1843) 2 Hare 461; 67 ER 189.

Loi (1904) (Amendement No. 2) sur la propriété foncière: Article 5.

re Blue Horizon Holidays Ltd *en désastre* (11th April, 1997) Jersey Unreported CofA.