C90. 15

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 5 of 1989

BETWEEN:

THE BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION - Appellant

and

SHELL ANTILLES AND GUANAS LIMITED - Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe, J.A.
The Honourable Mr. Justice Byron, J.A. (Acting)

Appearances: Dr. F. Ramsahoye, Q.C. & P. Webster, for Appellant
J. Archibald, Q.C. & Mr. Bennet & Ms. O'Neal, for Respondent

1990: Jan. 17,
June 25.

JUDGMENT

BISHOP, C.J. (Ag.)

By a written agreement dated 3rd August 1985, Shell Antilles and Guianas Limited (also called herein Shell) of Bridgetown, Barbados, a company incorporated in England and having a place of business in Road Town, Tortola, agreed to sell to British Virgin Islands Electricity Corporation (also referred to herein as the Corporation), a statutory corporation established under the British Virgin Islands Corporation Act, 1978, which agreed to buy from that company "the buyer's total requirements of petroleum products, in particular, automotive gas oil, premium gasoline, lubricating oils and greases, as the buyer may from time to time require for use.... at its power stations in the British Virgin Islands".

The commencement and duration of this Supply Agreement were stated in the first clause thus:

> "This Agreement shall have effect from the 3rd day of August 1985 and shall continue in force until the 2nd day of August 1987 and thereafter until either party gives to the other three (3) months' notice of its intention to terminate this Agreement."

Clause 15 of the said Agreement dealt with termination thus:

/"In the.....

> "In the event of a material breach of any terms of this Agreement by either the Buyer or Seller, the party not in breach shall be entitled to terminate this Agreement by giving three (3) months' notice in writing to the other party, provided however that if the party in breach shall within the period of notice remedy such breach to the satisfaction of the other party, notice of termination shall be withdrawn."

As far as notices were concerned, clause 20 stipulated:

> "Unless otherwise agreed, all notices given hereunder shall be served in writing to the addresses of the Buyer or Seller, as the case may be, as stated at the beginning of this Agreement."

On July 27, 1987 the solicitors for Shell wrote the Corporation stating, inter alia:

> "2. We are to invite your attention to the alleged remarks of one of the Directors of the Board of the above-mentioned Corporation.....set forth on pages 1 and 12 of the newspaper The BVI Beacon published in Tortola July 23, 1987 to the effect that a third party will become the supplier of fuel to the Corporation as from August 3, 1987.
>
> 3 .....if the said remarks are true, the Corporation will be in breach of this Agreement because our clients have not been given three months' written notice of the Corporation's intention to terminate this Agreement as required by Clauses 1 and 20 of this Agreement; and that such a breach will cause our clients serious financial loss and damage for which the Corporation will be held responsible,"

The letter also pointed out that Shell would continue to provide reliable service at the highest standards.

It was made clear therefore that Shell was not only alleging a breach of contract on the part of the Corporation, but also that Shell would regard the Corporation as responsible or liable for the serious financial loss and damage which it would suffer as a consequence of that breach.

On July 28, 1987 the secretary/accountant of the Corporation wrote the Manager of Shell as follows:

> "I am directed by the BVI Electricity Corporation to refer to Para 1 of the Supply Agreement between Shell Antilles & Guianas Ltd. and the BVI Electricity Corporation dated 3rd August 1985 whereby the parties entered into a two (2) year Supply Contract from August 3, 1985 to August 2, 1987 and to inform you that the Corporation will

/no longer.....

> no longer require supply of petroleum products after 2nd August 1987."

In another letter dated August 13, 1987, the secretary/ accountant informed the solicitors for Shell that in respect of the letter of July 27, 1987 he was directed to say

> "that it is the understanding of the Corporation that the Agreement was for a period of two (2) years ending 2nd August 1987 and notice was given verbally and in writing to the Manager of Shell Antilles and Guianas Limited of the Corporation's intention to cease purchasing of products from that date. A copy of the written notice is enclosed for your information and record."

There was an obvious difference of opinion. It was not resolved, and on the 8th September 1987, Shell filed Suit 104 of 1987 (in the High Court) asking for determination of the following issues:

(1) Whether a notice in writing dated July 28, 1987 given on behalf of the Corporation to the Company's manager in Tortola, terminating on August 2, 1987 an agreement in writing dated August 3 1985, between the Company, as Seller and the Corporation, as Buyer of petroleum products, was given in accordance with the terms of the said Agreement, and (2) whether the said notice was effective to terminate the said Agreement, or was otherwise of no effect and inoperative?

On the 8th February 1989, Bertrand, J. answered the above questions thus: (1) The notice in writing dated July 28, 1987 given to the Plaintiff's manager in Tortola, terminating on August 2, 1987 the written Agreement dated August 3, 1985 was not given in accordance with the terms of the said Agreement, and (2) the said notice was not effective to terminate the Agreement dated August 3 1985 and is therefore inoperative. The answers were embodied in an Order entered on 13th February 1989 and in which the Defendant was ordered to pay the Plaintiff's costs, to be taxed unless agreed.

There the matter rested for about seven months before the solicitors for Shell Antilles and Guianas Limited filed - on the 8th September 1989, a Writ of Summons (No. 126 of 1989) in which the Company claimed damages for breach of the Agreement dated August 3, 1985, between the Plaintiff as Seller and the Defendant as Buyer of petroleum products "by wrongfully terminating the said Agreement on August 2nd 1987 by a notice dated July 28, 1987 as determined by a judgment of this High Court of Justice dated

/February 8,.....

February 8, 1989 and entered February 13, 1989 on an originating Summons issued September 2, 1987 in Civil Suit No. 104 of 1987 between the same parties as are parties in this action". There was also a claim for costs and further or other relief.

A Statement of Claim and a Defence were filed on 17th October 1989 and 23rd November 1989 by the solicitors for the respective parties.

On the 25th November 1989 the solicitors for the Corporation filed a Notice of Motion seeking leave of this Court to Appeal out of time against the judgment in Suit 104 of 1987 and an Order that the hearing of the application be treated as the hearing of the appeal. It is appropriate to state the following grounds on which the Motion was based:

> "3. The Appellant was dissatisfied with the judgment but did not appeal because no damages had been claimed and the Appellant being a public body did not wish to continue the litigation by reason of the expense involved therein and because it wished to bring the litigation to an end.
>
> 4. On the 17th October 1989 the Respondent, in a new Suit No. 126 of 1989, served a Statement of Claim claiming damages including special damages in the sum of $524,890 against the Appellant, interest and other relief for breach of the same agreement which was the subject of the proceedings in Suit No. 104 of 1987.
>
> 4. The judgment in the said Suit No. 104 of 1987 is erroneous in that the Agreement was in law effectively terminated and it will be a grave miscarriage of justice if the Respondent is allowed to claim damages in these proceedings as well as costs in addition to the costs awarded in Suit No. 104 of 1987 on the basis of a judgment which is incorrect.
>
> 6. It is contrary to the public interest that the erroneous sums claimed by the Respondent should be claimed and/or paid on the basis of an erroneous judgment."

Ronnie W. Skelton, General Manager of the Corporation, swore an Affidavit in Support of the Motion. He referred to Suit No. 104 of 1987 and to the judgment delivered therein on the 8th February 1989; and, among other facts set out and relied on, were the following:

> "3. The Appellant which is a public body managing public assets and public funds, was advised by its legal advisors that the judgment was erroneous but the Appellant did not appeal because no damages were claimed and the Appellant

/did not.....

did not consider it in the public interest to continue the litigation with the costs and expense it would entail and in the circumstances the Appellant abided by the judgment.

4. .....

5. I am advised by Counsel and verily believe that the High Court was in error in holding that agreement dated 3rd August 1985 had not been terminated by three months' notice.

6. I am further advised by Counsel and verily believe that a notice dated 28th July 1987 given by the Appellant to the Respondent was effective to terminate the agreement dated 3rd August 1985 at the end of two years of its life."

The Affidavit also referred to the second Suit No. 126 of 1989 and to the fact that the Pleadings had reached the stage where a Defence was filed and served.

If, at July 27, 1987, Shell held the view that there would be a breach of the Supply Agreement - if the reported remarks of a Director of the Corporation were true - and that a serious financial loss and damage would thereby be caused the Company and for which the Corporation would be regarded as responsible, then it may be asked why could it not have brought one action against the Company for breach of contract and consequential loss and damage? Bringing two actions when one would have sufficed is not a bar to the second action, but in dealing with the latter, a court would undoubtedly demonstrate its feeling of such procedure in any award it made in respect of costs; and I think this was fully appreciated by the Applicant in the instant Motion (at paragraph 5 of the grounds above).

The British Virgin Islands Electricity Corporation was dissatisfied with the judgment of Bertrand, J. delivered on 8th February 1989. Its legal advisors advised that the said judgment was erroneous. It was fully aware that Shell considered it to be liable for loss and damage caused by its breach of the Supply Agreement. There was judgment in favour of Shell Antilles and Guianas Limited. These were facts and circumstances which the Corporation was in a position to contemplate and analyse before giving its legal advisors any further instructions. After considering those facts set out at paragraph 3 of the Affidavit of Ronnie W. Shelton (above), the conclusion was reached to abide by the judgment.

The Motion which was filed on 25th November 1989 came on for hearing before us on 17th January 1990. We indicated that we were concerned at that stage with only the application for an

/order.....

order that leave be granted to file - out of time - an appeal against the judgment delivered on 8th February 1989.

Learned Counsel for the Applicant submitted that, by the Rules of Court governing this application, it was necessary that the Applicant demonstrate that (i) there were substantial reasons for the application being made at this time, and (ii) the Grounds of appeal showed good cause for granting the application sought.

Under (i), learned Counsel referred to the grounds on which the Motion was based and emphasised (a) that Shell Antilles and Guianas Limited did not make a claim for damages in February 1988 when the Originating Summons was filed seeking a declaration that the contract dated 3rd August 1985 had not been effectively terminated; (b) that Shell now proposed, by another action filed in October 1989, to resuscitate the claim and confine the Court to the issue of special damages quantified at $524,890 and general damages for breach of the said contract of 3rd August 1985 - a claim for a large sum of moneybrought 8 months after it should have been; (c) that the Corporation was thereby lulled into a sense of false security; (d) that the Corporation was a public body managing public funds and, in February 1989, it would have had - at most - to pay costs. It was then content to let the matter rest, and save the expense of taking it farther; and (e) according to Ronnie Skelton, he was advised by Counsel and verily believed that the High Court was in error in holding that the Agreement dated 3rd August 1985 had not been terminated by 3 months' notice.

Dr. Ramsahoye, for the Applicant, frankly admitted to me "that the Corporation was content to let a "bad" judgment remain on Record but when money entered the picture it was not prepared to do so; and the Court ought to intervene now.

Under (ii), Counsel referred to the Grounds of Appeal set out in the draft Notice of Appeal, and submitted that the test to be applied was to ask the question: if the appeal had been filed within the time allowed for doing so, would the grounds be good and arguable grounds? In support of his submission learned Counsel referred us to the case LANGTON V. CARLETON (1874) L.R. Vol IX Ex. 57.

Learned Counsel asked this Court to grant leave to appeal out of time and within such time as the Court would allow , using the Grounds of Appeal in the Notice on Record

Mr. Archibald, for the Respondent, outlined the steps t[illegible]n

/betw[illegible] . . .

between July 27, 1989 and November 25, 1987. He urged that (a) the time for appealing against the judgment of 8th February 1989 expired on 22nd March 1989; (b) without seeking any extension of time to appeal and following service on the Corporation of the Writ of Summons (on September 8, 1989) and Statement of Claim (17th October 1989) in Suit No. 126 of 1989, the solicitors for the Corporation asked (on 10th November 1989) for time within which to file a Defence to the Statement of Claim; (c) on the 13th November 1989, the Company agreed to allow the Corporation time for so doing; (d) a Defence was filed and served on the 23rd November 1989, and, among other things, the Corporation relied in its defence, upon the said judgment it now sought to overturn as being incorrect; (e) a Reply to Defence was filed on the 24th November 1989; (f) when the instant application was filed on 25th November 1989 the action for damages was well underway and this was the first indication of any intention to appeal against the judgment.

Mr. Archibald asked this Court to hold that there were no good or bonafide or cogent reasons given for the failure to appeal in time and thus no good and sufficient reasons within the meaning of O 64 r.6 of the Rules of Supreme Court 1970; and that the Grounds of Appeal prima facie did not show good cause for appealing, nor were they, in any event, in compliance with O 64 r.3(3) and (5) of the Rules.

Learned Counsel submitted that paragraph 5 of the Affidavit of Ronnie Skelton was relied on as showing the substantial reason for the application, but neither this paragraph nor any other set out in the Affidavit, began "to address substantial reasons for lateness" (Counsel's words). Counsel urged that what was given in the Affidavit comprised, not a single ground as to why they were late, but only grounds of expediency why they should appeal. Counsel also submitted that the expectation that no action for damages would be taken beyond the declaration sought could not have "existed in the mind of anybody", on the basis of the history of the matter. Mr. Archibald submitted further that for a reason to be substantial it must be bonafide, and in the instant matter it could not be said that the only substantial reason was bonna fide when the Corporation, in its Defence, relied on the judgment of the 8th February 1989 and then sought leave to appeal against it some nine months later.

In support of these aspects of his submission, Counsel cited

EVELYN V. WILLIAMS (1962) 4WIR 265; RATNAM V. CUMARASAMY AND ANOTHER (1964) 3 ALL E.R. 933; MOSES V. KUMAR AND ANOTHER (1969) 14 WIR 328; PERSAUD AND OTHERS V. RAMSON (1979) 26 WIR 229; HARDIAL AND ANOTHER V. SOOKHIA (1980) 28 WIR 261; THOMPSON V. THOMPSON (1980) 33 WIR 256 and MARTIN V. CHOW (1985) 34 WIR 379.

Learned Counsel described the Grounds of Appeal as no more than purported grounds which were vague or general in their terms, disclosing no particulars of misdirection or error by the learned trial Judge. In his view, they ought to be struck out as they merely quoted what the learned trial Judge held and then claimed that she erred; thus they did not comply with the relevant rules of court; and, even if filed within the time allowed, they were not good grounds.

Counsel for the Respondent asked this Court to say that the Applicant offered no explanation for not filing the appeal within the time prescribed; that the Affidavit was "rooted in reasons why they decided not to appeal"; and that the Applicant was guilty of an unprecedented and flagrant breach of the Rules of Supreme Court 1970, Further, that if the appeal had been filed in time, the grounds relied upon would not have been good ones.

Rule 6(2) of Order 64 of the rules of Supreme Court 1970 reads as follows:-

> "Every application for extension of time when made to.....the Court shall be made by Motion. Every.....motion filed shall be supported by an affidavit setting forth substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor."

Counsel for the parties agreed that the motion ought to be supported by (i) an affidavit that showed substantial reasons why it was necessary to apply outside of the prescribed time for appealing and at the time the application was made and (ii) grounds of appeal which prima facie showed good cause for appealing against the judgment.

The Affidavit of Ronnie W. Skelton was relied upon in support of the Motion and I have already quoted the pertinent paragraphs. The remaining paragraphs contained undisputed facts (to which I have alluded earlier), and the conclusion of the deponent that if the claim for damages were to be allowed, there would be a grave miscarriage of justice.

/As I understand.....

As I understand the first part of paragraph 3(supra), the Appellant must have been advised by its legal advisors before the time for appealing had expired, that the judgment was erroneous; and it exercised its right not to challenge that judgment. As Counsel for the Corporation explained, the Corporation was content to leave that judgment on Record. However, when money entered the picture, it then asked this Court to be allowed to exercise its right of challenge notwithstanding the fact that the time for challenging the judgment had passed some 8 months earlier. Paragraph 5 of the Affidavit stated that Ronnie W. Skelton was advised by Counsel, whose advice he believed, that "the High Court was in error in holding that the Agreement dated 3rd August 1985 had not been terminated by 3 months' notice". Paragraph 6 also disclosed advice given the deponent by his Counsel.

With respect, I did not find Langton v. Carleton to be helpful in arriving at a decision based upon O 64 r.6(2) of the Rules of Supreme Court 1970. It was a majority decision concerning the determination of an agreement "for 12 months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months' notice in writing of his desire so to do". This case may have helped if the appeal was heard.

The facts outlined by Mr. Archibald (see above) were not disputed and I have accepted them as the relevant chronology of steps in this matter now before us. In addition, I have also borne in mind that no application for leave to appeal was made within a month after 22nd March 1989 (the date of expiration of the six-week period for appealing after delivery of the judgment), to a single judge of the Court of Appeal.

Rules of Supreme Court 1970, like other rules and regulations, are made for the convenient and orderly conduct of litigation. They are made to be obeyed though it is realised that there may be occasions of non-compliance and then the said Rules make the necessary provisions to cover such an eventuality. I have already quoted O 64 r.6(2).

In Ratman v. Cumarasamy (above), an appeal from thhe Court of Appeal of the Federation of Malaya to the Judicial Committee of the Privy Council, Lord Guest stated:

/"The rules.....

> "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."

In REVICI V. PRENTICE HALL INC. (1969) 1 ALL E.R. 772, Lord DEnning, MR said (at page 774):

> "Nowadays we regard 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 considred).

In the same case Edmund Davies, L.J. said (at page 774):

> ".....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."

In Evelyn v. Williams (supra), an appeal to the Federal Supreme Court from the Supreme Court of British Guiana, the applicant made application to a judge of the court below for an extension of time within which to appeal, but the application was one day out of time. He then applied to the Federal Supreme Court. Marnan, J. referred to Order 2 r.3(5) as amended, of the Rules of Federal Supreme Court governing appeals from British Guiana. The rule was almost identical to O 64 r.6(2) of the Rules of Supreme Court 1970 with which we are here concerned. The former rule required "good and substantial reasons" for the application. Marnan, J. said this, in that case (page 267, letter B):

> ".....the affidavit must set forth in the first place, good and substantial reasons for the application. To my mind, one meaning, if not the most obvious meaning, of those words is that the application must set forth a good excuse for the applicant's lateness."

In Persaud and others v. Charles Rishiram Ramson (also cited by Mr. Archibald), Order 2 r.3(5) of the Court of Appeal Rules of Guyana was considered. Its terms were the same as in the Federal Supreme Court Rules 1959. George, J.A. said (at page 230):

/"It is beyond....

> "It is beyond dispute that an application for an enlargement of time within which to bring an appeal is not granted as a matter of course. And this fact is underscored by the two requirements which, under sub-rule 5, must be set forth in the affidavit, viz., good and substantial reasons for the application and grounds of appeal which prima facie show a good cause for appealing.....in my view the expression 'good and substantial reasons" .....is not capable of any precise definition but I apprehend that it is intended to cast upon the applicant the burden of placing before the court or judge bona fide and cogent reasons for his failure to comply with the requirements to file his appeal within six weeks after judgment is delivered. For it has rightly been observed that one begins from the basic position that 'the rules are there to be observed', per Lord Denning, MR in Revici v. Prentice-Hall Inc. But the words 'good and substantial reasons' do not mean that the applicant is required to dischcarge a higher burden or proffer more cogent reasons than would otherwise be required of him had they been omitted from the sub-rule. For even without these words he would yet have to offer some good and sufficient excuse before the court would exercise its discretion in his favour."

Hardial's case (supra) was also heard by the Court of Appeal of Guyana and in the judgment at page 265 letter b,R.H Luckhoo, J.A. pointed out that:

> "the categories of 'good and substantial reasons' within the contemplation of the provisions of Order 2 r.3(5) of the Court of Appeal Rules are not closed. They cannot be, as the variety of human circumstances is infinite. It is an impossible task to lay down in the iron framework of a definition that which will constitute 'good and substantial reasons'. The merits of each application will have to be examined from the standpoint of the facts and circumstances set out in the affidavit in support of it. Cases such as Moses v. Kumar, Evelyn v. Williams, Ratnan v. Cumarasamy, Revici v. Prentice-Hall Inc and Persaud v. Ramson all emphasise that fact and underline the principle that rules laid down or sanctioned as to time are to be observed unless justice clearly indicated that they should be relaxed. It is true that the modern tendency is to give a liberal construction to rules regulating practice and procedure. Courts avoid a too harsh and rigid construction. They realise that rules are designed to serve justice, and.... they provide the machinery of the law, the channel and means whereby the law is administered and justice reached. One should seek to strike a fair balance between a too rigid application of principle and the giving of too much latitude to those who fail to comply. Principles should be adapted to meet the changing circumstances of the times. But, at the same time, one should bear in mind that respect for and faithful observance of the rules will always ensure a smooth working of the machinery for the determination of a litigant's rights."

/I have already....

I have already referred to the contents of the affidavit on which British Virgin Islands Electricity Corporation relied. In my opinion, there was a conspicuous absence of material upon which the Court could properly exercise its discretion in favour of the Corporation. There was absolutely no satisfactory explanation for its tardiness in making the application. There was more than sufficient time for the Corporation to consider whether to appeal or not. Before the six-week period for appealing had elapsed, the Corporation knew from its legal advisers that it was their view that the judgment was erroneous. However, the Corporation decided to accept or to abide by the judgment - that was from February 1989. In November 1989, the Corporation decided - and asked for an extension of time - to defend a claim for damages (Suit No. 126 of 1989) filed by Shell Antilles Guianas Limited in September 1989. That claim was prompted by the judgment delivered. The Defence which the Corporation filed showed unequivocally that the Corporation relied on the same judgment which, from February 1989, it chose to accept for guidance. It was then the day after a Reply to Defence was filed, or a little over 9 months after the delivery of the judgment, that the Corporation manifested an intention to challenge the same judgment, by filing the instant Motion. I am satisfied that the applicant has not discharged the onus of putting before this Court "bona fide and cogent reasons" for its failure to file the appeal within the prescribed period for doing so.

The first of the requirements in O 64 r.6(2) of the Rules of Supreme Court 1970 has not been achieved, and as each requirement must be established the Motion must fail. It is unnecessary therefore to consider fully the other requirement. It will suffice to say that I share the view of the learned Counsel for the Respondent that the Grounds of Appeal on record failed to provide necessary particulars of the alleged errors in law (see Order 64 r.3(3) and did not show good cause.

For these reasons I would refuse the application and I would dismiss the Motion, with costs to the Respondent to be taxed.

E.H.A. BISHOP,
Chief Justice (Acting)

G.C.R. MOE,
Justice of Appeal

C.M.B. BYRON,
Justice of appeal (Acting)