BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO: 6 OF 1997

BETWEEN:

1. **RAMSGATE RESOURCES N.L**
2. **PHILLIP CLIFFORD**
3. **PETER DAWSON**

Appellants

and

P. H. NOMINEES LTD

Respondent

Before: The Hon. Mr. Albert N. J. Matthew Justice of Appeal [Ag.]

Appearances:

Mr. S. Husbands for the Appellants

Mr. M. Fay for the Respondent

1998: January 15,
February

JUDGMENT

MATTHEW J. A. [Ag.]
[In Chambers]

This is an application by summons for leave to serve notice of appeal out of time and for further directions filed on December 5,1997.

After a hearing in Chambers in the High Court, Georges J. on March 14, 1997 made declarations and orders in the following terms:

"IT IS DECLARD THAT:

1. The purported meeting of the directors of the Fourth Defendant on 12th December, 1996 and the resolutions purportedly passed thereat were invalid and ineffective;

2. Messrs. Noe, Lucero, Perez, and Dankmeyer are the only directors of the Fourth Defendant;

IT IS ORDERED THAT:

3. [a] the Second and Third Defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from acting as purporting to act as, or otherwise howsoever holding themselves out as directors and or officers of the Fourth Defendant;

[b] the Third Defendant be restrained whether by himself, his servants or agents or otherwise howsoever from acting as or purporting to act as or otherwise howsoever holding himself out as a director or officer of Minero Bruno S.A. and /or Minero Pedro S.A.

[c] the First, Second and Third Defendants and each of them be restrained whether by themselves or their servants or agents or otherwise howsoever from diluting or purporting to dilute the share holdings of the Plaintiff in the Fourth Defendant whether by transferring shares owned by the Plaintiff to the First Defendant or purporting to issue further shares in the Fourth Defendant to the First Defendant or otherwise howsoever;

[d] the First, Second and Third Defendants and each of them be restrained by themselves or their servants or agents or otherwise however from taking any action based on the resolutions purportedly passed or the budgets purportedly adopted on 12th December 1996.

4. there be delivery up to the Plaintiff within 4 days hereof of the corporate secretarial and other records of Fourth Defendant;

5. there be delivery up to the Plaintiff within 14 days hereof of the Plaintiffs share certificates in the Fourth Defendant;

6. there be liberty to either party to apply;

7. the Plaintiffs costs to be taxed unless agreed otherwise and to be paid to the Plaintiff by the First, Second and Third Defendants."

On April 25, 1997 the Appellants filed a notice of appeal and there is no dispute between the Parties that the grounds of appeal in issue are those contained in paragraphs 3[a] and [b] of the notice of appeal and are as follows:

"3. The grounds of appeal are as follows:

[a] The learned judge erred in law in failing to limit the injunctions against the appellants to the matter in issue in the suit, namely, the invalidity of a meeting of the directors of Oro Huasi Exploration Inc. ["OHE"] held on 12th December, 1996.

[b] In the circumstances the injunctions are too wide and /or are not clear and/or are capable of preventing the second and third appellants from acting as directors or officers of OHE even if they are subsequently validly appointed as such; and further are capable of preventing the third appellant from acting as a director of Minero Bruno S.A. and or Minero Pedro S.A. even if they are subsequently validly appointed as such; and further are capable of preventing the first and third appellants from diluting the shareholding of OHE even pursuant to validly passed resolutions."

The application becomes necessary because although the Appellants filed their appeal exactly six weeks after the judgment in accordance with Order 64 Rule 5 they did not serve the Respondent with the notice of appeal within seven days as required by Rule 7[2].

The Appellants filed an affidavit in support of the Summons. Paragraph 2 of the affidavit acknowledges their breach of Rule 7[2] and they allege that they served the notice on the Respondent on May 21, 1979, that is 19 days after the last day for service, that is May 2,1997. Paragraph 3 gives the reasons for the delay in effecting service of the notice of appeal. Obviously they are regarding the service of May 21,1997 as proper service and merely giving reasons for the 19 day delay. The Appellants are anticipating a successful application and so they are also asking for directions in paragraph 9 of the affidavit to comply with Order 64 Rule 11 and to prepare the record for the appeal.

A copy of the transcript of the proceedings in the Court below was submitted as an exhibit.

THE BACKGROUND FACTS

In essence the first Appellant and the Respondent and Another were share holders in a certain I.B.C. The first Appellant and the Respondent each had 37.5 per cent of the shares and the Other had 25 per cent. According to the transcript and learned Counsel for the Respondent, what gave rise to these proceedings is that the first Appellant purported to pass a resolution at a directors' meeting held on December 12, 1996. The learned Judge found that the meeting was invalid. At the meeting it was purported to appoint the second and third Appellants as directors of the

company. The learned Judge found that because the meeting was invalid Mr. Clifford and Mr. Dawson were not appointed as directors. This finding is not challenged on appeal.

Having found that Clifford and Dawson were not validly appointed directors, the learned Judge granted injunctions restraining them from holding themselves out as directors and restraining all the Appellants from taking any action on the basis that the said meeting was a valid meeting.

Learned Counsel for the Respondent submitted and this was not challenged that the matter came before the learned Judge by way of an application for summary judgment and at that hearing learned Counsel who appears for the Appellants in these proceedings was in appearance and conceded that the Respondent who was then the Plaintiff was entitled to injunctive relief against his clients and the only dispute between the Parties on the application for summary judgment was as to the exact wording of the injunction.

Mr. Fay states that it is only since the order that Mr. Husbands has come up with a different set of words.

I observe at page 4 of the transcript that the learned Judge offered Counsel for the Appellants time to present a draft to the Court so that:

> "we could have seen precisely what you are talking about rather than just words. Don't you think you could do that for us and let us see something in black and white?"

Counsel's response was that he did not want to delay the proceedings. After further discussion it was agreed to insert "liberty to apply" in the order and the learned Judge explained it in this way:

> "In other words, it is not absolute. You can always come back if you wish to, to seek some sort of modification or addition."

AUTHORITY TO EXTEND TIME

Learned Counsel for the Appellants submitted that the basic principle is that a party should not be driven from the judgment seat because of an oversight or failure to follow a rule if he can show a good reason or excuse for such failure and there is no prejudice to other side. Counsel submits that the Court is to be guided by Order 2.

I think it is to Order 3 Rule 5 one must go to see the power of the Court to extend time for appealing. This rule is to be read with Order 64 Rule 6[2]. According to McCowan L.J. in **NORWICH AND PETER BOROUGH BUILDINGS SOCIETY v STEED** 1991 2 AER 880 the matters which the Court takes into account in deciding whether to grant an extension of time are the following:

1. the length of the delay;
2. the reasons for the delay;
3. the chances of the appeal succeeding if the application is granted; and
4. the degree of prejudice to the respondent.

I shall look at these matters as they relate to this case.

Norwich and Peterborough was followed and applied by our Court of Appeal in **HARY SIMON and CAROL HENRY,** Civil Appeal 1 of 1995, from Antigua decided on July 3,1995.

THE LENGTH OF THE DELAY

In Norwich McCowan L.J. stated that on any view a 62 months delay was substantial. Learned Counsel for the Respondent looked at delay in two parts the first being from May 2, the last day for regular service to May 21 or 22, the

date of actual service; and the second part being from May 16 when the Appellants' solicitor was informed that there was no service, to December 5 when the application for leave was made.

I cannot help observing an element of tardiness in the

prosecution of this appeal. The notice of appeal was filed on the last possible date after the judgment. Then there was a deliberate decision to delay service till the last day, May 2, but here time over took them resulting in the stated oversight. On May 16, the appellants' solicitor were informed that the Respondent was not served. Another five or six days elapsed before service of a document which had already been filed. The Appellants took no further action after that until December 5 when they filed this application. They could not have believed their service on May 21 or 22 was in order. If they did why did they not proceed to prepare the record? I believe they were quite aware that they needed the Court's leave and then would follow the normal prosecution of the appeal and that is why in this summons they ask not only for leave to serve the notice of appeal out of time, but also further directions to prosecute the appeal. Paragraph 3/5/1 of the United Kingdom Supreme Court Practice 1997 deals with the scope of the rule under consideration. It states in part;

> "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 Q.B.D. 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 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 Q.B.D.
>
> > 722, p.723, C.A.]. A special circumstance, however, such as excessive delay may induce a court in its discretion to refuse to extend time [per Jessel MR. Eaton v. Storer [1882] 22 Ch.D.91, C.A. p.921. The strictness of procedure in open court is somewhat relaxed in chambers [per Brett L.J., Carter v. Stubbs [1880] 6 Q.B.D. 116 C.A,. p.121]. On the other hand application to enlarge the time for an appeal when the litigant has had his trial and lost, will not generally be granted unless there is material on which the court can exercise its discretion [Ratnam v. Cumarasamy [1965] I W.L.R. 8; [1964] 3 all E.R. 933, P.C.]"

I am of the view that the period of delay for this application is substantial.

THE REASONS FOR THE DELAY

I have already referred to the deliberate decision of the Appellants to wait till the end of the period limited for service of the notice of appeal to serve the Respondent while according to them they were engaged in discussions for the settlement of the litigation and the resulting oversight. Learned Counsel for the Respondent submitted that there were no discussions for the settlement of the litigation as the litigation was already completed. I do not think that could be a substantial reason for the failure to serve the notice of appeal at the end of the period for service, that is, May 2, 1997. Absolutely no reasons have been advanced for waiting seven months to apply to this court for leave to serve the notice out of time notwithstanding the fact that the Court sits in this territory twice each year.

THE DEGREE OF PREJUDICE

The Respondent concedes that he cannot advance any real prejudice over and above the normal prejudice a person

who is entitled to a judgment suffers by waiting a longer period to reap the fruits of his judgment.

THE CHANCES OF THE APPEAL SUCCEEDING

Learned Counsel for the Respondent submitted that the appeal has no prospects of success on the merits whatsoever, the reason being that there is no real allegation that the learned Judge has erred in law, the allegation is that he should have used his discretion to grant the injunction in a different form of words.

Learned Counsel for the Appellants submitted that there was no

special requirement to show merit in the appeal on an application for extension of time as was required in the case of a default judgment or summary judgment. The authorities do not support that submission. Nevertheless Counsel argued that if the Board properly constituted, appointed the same directors at a future date the injunction would prevent them from acting. Hence Counsel argued that the injunction was too wide despite the provision of 'liberty to apply'' in the order since it would place a burden on the directors to come to the Court to get the injunction set aside.

Now if the directors who were wrongfully appointed at an invalid meeting were ever to become properly appointed why should there not be an onus on them to purge or correct anything illegal surrounding their appointment?

The injunction as ordered by the learned Judge takes effect from March 14, 1997. I have seen a draft order which learned counsel for the Appellants would have wished the learned Judge to apply. The difference, between the wording of the Judge's order and that of Counsel is that the latter contains the words Abased upon the purported meeting of the

directors of the Fourth Defendant on 12th December, 1996 or the resolutions purportedly passed there at." or words of similar connotation.

Frankly, I do not see that the words suggested by Counsel add anything to the order of the learned Judge except perhaps to make the order less clear and concise.

If I am a trespasser to neighbouring land and an injunction order is made against me can I not buy the land over which I was found to be trespassing at a later date? Certainly I can, and then ask for the injunction to be set aside or consider it spent. What I cannot do is to say the injunction when granted is too wide because in the event I become owner, the onus is on me to go back to the Court.

Learned Counsel for the Appellants in the final analysis agreed that the appeal is a narrow point under paragraph 3[a] and [b] of the notice of appeal.

I have indicated above what the Appellants seek to attain, namely, a change of terminology of the order of the learned Judge. I am of the view that the order of the learned Judge is sound and is also able to deal with any changed circumstances that the Appellants hope, can or may take place in the future. On this issue I would hold that the Appellants have failed to show grounds of appeal which prima facie show good cause. They have also failed to show substantial reasons for their application.

Accordingly, I order that the summons stands dismissed with costs to the Respondent, to be taxed if not agreed.

A.N.J.MATTHEW
Justice of Appeal [Ag.]