SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 OF 1998

BETWEEN:

[1] NICHOLSON DICKSON
[2] MURIEL DICKSON

Appellants

and

BARCLAYS BANK

Respondent

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

Appearances:
Mr. K. Monplaisir, Q.C. for the Appellants
Mr. A. McNamara for the Respondent

1998: March 19;
April 1.

JUDGMENT

MATTHEW, J.A. [AG.]
[In Chambers]

On February 25, 1998 the Applicants filed a summons under Order 64 Rule 6[1], [2] and [3] of the Rules of the Supreme Court asking for an extension of time for filing a notice of appeal in suit 136 of 1993 whereby judgment was given in favour of the Respondent on December 19, 1997.

By Order 64 Rule 5 the time limit for filing the notice of appeal should have been January 30, 1998; that is six weeks from the date of the judgment delivered. Rule 6[1] allows the Applicant to apply

by summons to a single Judge of the Court of Appeal if he applies not later than one month from the time limit, in this case, if he applies not later than March 3, 1998.

So the Applicants have satisfied this last requirement since their application was as stated earlier filed on February 25, 1998.

The Applicants on the said February 25, 1998 filed an affidavit in support of their summons and exhibited to the affidavit are a copy of the judgment in suit 136 of 1993; a letter to Barclays Bank written on behalf of the Applicants dated January 15 1998; a reply by the Bank dated January 20, 1998; and a draft notice of appeal.

Learned Counsel for the Applicants referred to paragraphs 16-18 of the affidavit in particular and to the correspondence to and from the Bank as showing some reason for the delay.

Counsel then submitted that once you apply within the month the Court does not look at the grounds of appeal but all it looks at is if there is sufficient reason for the delay. In support of that proposition Counsel cited the case PALATA INVESTMENTS LTD v BURT LTD 1985 2 AER 517; 521 [b]. Counsel further submitted that the thrust of the Applicants' case is in equity and that it was because the Bank wrongly signed a radiation that the case was begun.

Learned Counsel for the Respondent submitted that upon such applications the Court needs to look at the length and reason for the delay; the chances of the appeal succeeding; and the prejudice to the Respondent. In support Counsel cited the following authorities:

CASIMIR v SHILLINGFORD [1967] 10 WIR 269; NORWICH v PETERBOROUGH 1991 2 AER 880; IRA LIBURD v ELSIA LIBURD Magisterial Civil Appeal No. 7 of 1993.

Counsel then examined the length and reason for the delay and the chances of success and submitted that there was no good reason for the delay and the chances of appeal succeeding were poor.

I agree with learned Counsel for the Respondent as to what the Court should consider upon applications for extension of time under Order 64. Earlier on the very morning that this application was argued, I had already given learned Counsel for the Applicants a copy of a judgment in which the case of Ramsgate Resources N.L. v P.H. Nominees Ltd. decided in February 1998 was mentioned.

In Ramsgate I referred to the Norwich v Peter Borough case and I stated the four things which the Court takes into account in deciding whether or not to grant an extension of time for filing an appeal.

The submission by learned Counsel for the Applicants based on the case of Palata Investments Ltd. is clearly wrong and untenable. The same error was made by Counsel in the Norwich case. Lord Donaldson of Lymington M.R. at page 885 deals with it. He agreed with McCowan L.J. that an extension of time for appealing should be granted but he went on to comment on the same submission which is put forward here by learned Counsel for the Applicants. Pages 885/886 of the Norwich case is as follows:

> "LORD DONALDSON OF LYMINGTON MR. I agree that this is a case in which an extension of time for appealing should be granted for the reasons given by McCowan LJ.
>
> However, I wish to comment on one passage in the skeleton argument for the applicant. This reads as follows:
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> > 'The [applicant] submits that there is a good excuse for the whole of the delay and that it is not necessary to look at the merits: see The Supreme Court Practice 1991 [including 1st supplement] at para 59/4/4, *Palata Investments* ([1985] 2 All ER 517, [1985] I WLR 942)

> and *Nestle v NatWest Bank* (1990) Times, 23 March).'

This submission is not correct. Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant. The classic statement of the elements of this equation is to be found in the judgment of Griffiths L.J. in *CM Van Stillevoldt BV v EL Carriers Inc* [1983] I All ER 699, [1983] I WLR 207, which are set out in *The Supreme Court Practice 1991* vol I, para 59/4/4 and are, as McCowan LJ has set them out, namely: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if an extension of time is granted; and (4) the degree of prejudice to the respondent if the application is granted.

In *Palata Investments Ltd. v Burt & Sinfield Ltd.* [1985] I WLR 942 the delay was only three days and it was fully explained. In such circumstances the balancing exercise would be unlikely to come down on the side of refusing an extension of time, but in an extreme case of lack of merit it could do so. That there is always a discretion was emphasised in the judgment of Ackner LJ, where he said ([1985] 2 All ER 517 at 521, [1985] I WLR 942 at 947):

'Before us the matter was estimated to last two hours, as indeed it would have done but for the fact that at the outset, having drawn attention to the procedure which used to exist, we expressed the opinion that, in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasize that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed an unkindness to the appellant himself, to extend his time for appealing, after he has allowed the time to elapse, to enable him to pursue a hopeless appeal.'

The Palata Investments case was not dealing with any situation where there was a one month period within which to apply. It was a case where the application was late by only 3 days after the original four weeks period from the date of the judgment and yet even here in an extreme case of lack of merit the Court could refuse to grant an extension.

So I have to exercise my discretion in accordance with the principles set down in the Norwich case and others.

The length of delay was 26 days. The reasons given were the Applicants waiting to see if the Bank would make an ex gratia payment after receipt of their letter of January 20, 1998 and further consultation as to whether an appeal should be filed. I do not think there can be said to be any particular prejudice the Respondent. I notice that the Respondent's Counsel did not advance any argument to that effect.

As to the chances of the success of an appeal it seems to me that I should look at the case of each Applicant separately. The first ground of appeal relates only to the second Applicant.

The learned Judge who tried the case made some remarks in his judgment. I think it was the very last paragraph which indicated that a grave injustice had been done to her.

I think it was these remarks which prompted the solicitor's letter to the Bank on January 15, 1998. It is the reply to that letter which may have given hope to the Applicants that some ex gratia payment would be forthcoming.

I would agree that there is no chance of success in an appeal by the male applicant. I am not sure I can say the same as regards the female applicant.

The learned Judge held at page 11 of the judgment that the judgment in default against Mrs. Dickson was clearly unjustified as she was not at the time indebted to the Bank in respect of the 1980

hypothec or the vehicle loan or the furniture loan. At page 12 he said some 8 years after the entry of the default judgments both properties were sold by judicial sale of the sheriff.

At page 13, from the last paragraph to the middle of page 14, he chronicles the position of the second plaintiff and repeats the grave injustice that has been meted out to her. Does this sound familiar? I am not presently prepared to say she has no chance of success on an appeal.

In all the circumstances I grant to the Muriel Dickson a further period of 14 days from today within which to file her notice of appeal. Costs shall be in the cause.

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