

27th June, 1985

85/63

COURT OF APPEAL (SINGLE JUDGE)

Sir Frank Ereaut, Bailiff.

BETWEEN

Jersey Demolition Contractors Limited

Appellant

AND

The Resources Recovery Board

Respondent

Advocate G.R. Boxall for the Appellant

Advocate C. Whelan for the 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.

On 24th February, 1982, the Inferior Number heard an action between Jersey Demolition Contractors Limited, the Appellant, and the Resources Recovery Board, the Respondent. The case arose out of the following facts. The Respondent operated and still operates, a number of rubbish tips, including one at La Collette Reclamation Site. The Appellant tipped waste material on that site. In 1978 and 1979 the Respondent brought into operation a system for charging persons wishing to use the tip at that site. As a result the Appellant brought the action alleging that charging for the use of these tips was ultra vires the powers of the Respondent. At the trial that issue narrowed itself down to the question whether the charges were a form of tax or whether they were merely an administrative fee in a commercial setting charged for the services provided to persons wishing to avail themselves of the tip.

The Court conceded that if it had found that the charges partook of the nature of a tax, then the imposition of them would have been ultra vires, because the Respondent could not without the express authority of the States impose a form of tax. However, the Court found that the charges were of the nature of isolated levies on persons seeking to avail themselves of the tipping facilities at La Collette, and were therefore lawful. Accordingly, on the same date, 24th February, 1982, the Court discharged the Respondent from the action.

Exactly one month later, on 24th March, 1982, the Appellant filed a notice of appeal on the grounds that the Royal Court erred in law in deciding that:-

(a) the Respondent had the power to impose the charges of which the Appellant complained and/or

(b) the said charges were not a tax or charges in the nature of a tax.

That notice of appeal was served within the period prescribed by the Rules, and it was therefore the duty of the Judicial Greffier, under Rule 7, to cause the proceedings at the trial to be transcribed and a copy of the transcript served on the Appellant.

Rule 8 provides that at any time before the expiration of four months after the day on which the Appellant has received from the Greffier the copy of the transcript, he shall lodge with the Greffier and with the Respondent copies of certain documents, including the "Appellant's case."

Unfortunately the recording facilities did not operate properly, and so on 30th March, 1982, the Greffier informed the Appellant's lawyer that there was no transcript and that in consequence the four months period would start to run from that date, and would expire on 30th July, 1982. This was not, and is not now, contested by the Appellant's lawyer.

The documents required to be lodged by 30th July, 1982, were not lodged by that date and indeed nothing further was heard by the Respondent from the Appellant's lawyer until 24th January, 1985, when the documents were lodged with the Greffier and copies delivered to the Respondent. The Respondent objected that the documents were served out of time, and referred to Rule 10 which states -

"Subject to the provisions of Rule 16, if at the expiration of the period of four months fixed by Rule 8(1) the appellant has not taken the steps prescribed thereby his appeal shall be deemed to have been abandoned."

However, Rule 16(1) states -

"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, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The Appellant therefore seeks an enlargement of time under that Rule.

There was a delay of 2 1/2 years in complying with Rule 8. Advocate Boxall conceded that that delay was very lengthy and indeed was excessive. His explanation for the delay was that the case raised important legal issues and needed a long period of uninterrupted thought and research to prepare. The preparation of the case was made more difficult by the absence of a transcript. It was a long time before he had the necessary time to prepare the case. He could have given the case to an English lawyer to prepare, but he felt that that was not right, because it was a Jersey matter and he had no transcript. He did think of handing the case over to Jersey counsel, but because there was no transcript he would have had to prepare a case in writing from what he remembered at the trial, and so not much time would have been saved.

Conceding that the delay was indeed very lengthy, Advocate Boxall argued that the Court of Appeal or single judge thereof had a power, and indeed a duty, when exercising the discretion given by Rule 16(1), to take into account the nature of the decision from which it was sought to appeal, and all the facts and circumstances of the case. The present case, he contended, raised important issues concerning the powers of a Committee of the States to raise funds or to charge for a service without the prior approval of the Assembly of the States. Moreover, the Appellant was sponsored by the Jersey Builders and Allied Trades Employers Federation, a group which had a particular interest in the issues because the levying

of charges for dumping had a substantial effect on their costs, and any sudden increases in dumping charges increased their costs which they could not recover from clients with whom they had fixed price contracts. If the Respondent's action in levying charges in one site went unchallenged, charges might be levied in respect of other sites. Counsel submitted that the importance of the issues outweighed the factor of the long delay, and that no undue prejudice would be suffered by the Respondent if an enlargement of time were granted to enable the appeal to go forward.

Counsel for the Respondent argued that in exercising the discretion under Rule 16(1) the Court or a single judge was concerned only with the length of the delay and the reasons or lack of reasons, for it. The importance of the issues which were the subject of the appeal were not a relevant factor. However, important they might be, nothing could excuse a delay of 2 1/2 years, and in the present case there was no justification for such a delay. All litigation must have an end, and if the appeal were now to be allowed to proceed it would be prejudicial to the Respondent, which had continued during the period of delay to levy thousands of individual charges. Moreover, during the intervening period reclamation schemes had been costed on the assumption that charges for dumping could lawfully be levied.

Advocate Boxall referred us to Order 3, Rule 5/1 of the Rules of the Supreme Court (the "White Book"), where two old cases are cited. These are *Atwood v. Chichester* (1878) 3 QBD 722 and *Eaton v. Storey* (1882) 2 Ch. D.91, both of which seem to lay down the principle that when an application for an extension of time is made the application should be granted unless to do otherwise would result in irreparable mischief. Moreover, in the *Atwood* case the merits of the defence were undoubtedly taken into account (see page 724).

The principle referred to above was criticised in two much more recent cases, where a different approach was adopted.

In *Ratnam v. Cumarasamy* (1964) 3 All E.R. 933, PC., Lord Guest gave the decision of the Judicial Committee of the Privy Council, and the following extract from p. 935 is relevant -

"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 that 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 this 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 those 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*, when he said:

"When sitting at chambers, I have often heard it argued that when 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 that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think a correct view".

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."

Whilst conceding that that judgment disclosed a different and much stricter approach compared with the older cases, Advocate Boxall argued that the word "material" in the extract cited should be interpreted as including, where appropriate, the importance of the issues in the case. I am unable to agree. Looked at in its context, it is clear to me that "material" was intended to mean matters relevant to the delay. If one reads the whole of the report of the case, including the headnote, it seems incontrovertible that the Judicial Committee was not in any way concerned with the facts of the case sought to be appealed from, which are barely mentioned, but only with the facts relevant to the delay in seeking to appeal.

The other more modern case cited was *Revic v. Prentice Hall Incorporated* (1969) 1 All E.R. 772 C.A. At pp. 773-4, Lord Denning, M.R., said

"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 when there is no 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* (1) and *Atwood v. Chichester* (2), and urged that time does not matter as long as the costs are paid. 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 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."

Advocate Boxall pointed out that earlier in his judgment Lord Denning had referred to the facts of the case. It is true that he did, but in my view only in order to set the scene for his account of the delay. Nowhere in his reasons for dismissing the appeal does he refer to the facts as having contributed to those reasons. Counsel suggested that the use of the phrase: "There is a very general power in the court to extend the time", amounted to such a reference, but I regard that as a circular argument. The fact is that in dismissing the appeal Lord Denning took into account only the factors relevant to the delay.

Edmund Davies, L.J., added the following judgment at p. 774 -

"The real question raised by this appeal is very simple: When a party has exceeded to a substantial degree the time limit set by the Rules of the Supreme Court within which an interlocutory step has to be taken, can it be said that he is entitled to have his time extended simply on undertaking to pay any costs occasioned by his delay, so that a judge who nevertheless refuses to extend his time must necessarily be regarded as having exercised his discretion wrongly?"

The notice of appeal herein submits (in effect) that that question calls for an affirmative answer, certainly in cases where it is not shown that the other side have suffered irreparable damage as a result of the delay. I disagree. On the contrary, 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 *Ratman v. Cumarasamy* (3), 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. I therefore concur with Lord Denning, M.R., in holding that this appeal should be dismissed."

Both judgments cited above refer to the fact that no explanation or excuse had been offered in the Revici case. Counsel conceded that a totally inadequate excuse for a delay had substantially the same effect as no excuse at all, and that must of course be so.

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.

Counsel argued that even if that were the position in England, a different view should be taken in Jersey. I see no reason to do so. I have already quoted Rule 10 of the Jersey Rules. There is no corresponding Rule in the Rules of the Supreme Court, so it could well be argued that the Jersey Rules emphasise more strongly the importance of complying with the Rules as to time.

I concede that the issues were not simple and the absence of a transcript did not make counsel's task any easier. Nevertheless, taking into account all the matters put forward in explanation, a delay of two and a half years is totally excessive and unjustified. If there was genuine difficulty in complying with the time limits provided by the Rules, then the Appellant could, and should, have approached the Respondent and/or the Court or a single judge for a reasonable extension of time, which at that stage might very well have been granted. This is a case where, as in the Ratnam case, the Appellant has had its trial and lost, the delay in complying with the Rules for appealing has been totally excessive, and the reasons given for the delay have been entirely inadequate and have in no way justified the delay. The Rules are there to be complied with, because litigation must terminate within a reasonable time, irrespective of the merits of the issues, or of the prejudice to the Appellant who has delayed and is refused an extension of time.

The application by the Appellant for an extension of time within which to lodge with the Judicial Greffier the documents listed in Rule 8(1) of the Rules is therefore refused.