BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL No. 4 of 1992

In the Matter of
SOUTH SOUND PROPERTIES LIMITED

and

In the Matter of
THE COMPANIES ACT, CAP. 243

BETWEEN:

THE LIQUIDATOR OF SOUTH SOUND PROPERTIES LIMITED
Appellant

and

ALEXANDER HEWITT
Respondent

Before: The Rt. Honourable Sir Vincent Floissac - Chief Justice
The Honourable C.M. Dennis Byron - Justice of Appeal
The Honourable Dr. N.J.O. Liverpool - Justice of Appeal

Appearances: Mr. H. St.Clair Douglas for the Appellant
Mr. A. Hewlett and Mr. A. Linton for the Respondent

1993: June 21, 22
September 13.

JUDGMENT

LIVERPOOL, J.A.

On 8 July, 1988 a loan agreement was entered into between Mark F. Dolan (the Borrower) and the Respondent as a result of which the Respondent lent the borrower the sum of $390,000.00. On the same day Mr. Dolan also executed a promissory note with respect to that loan. Under the recital of the agreement a charge was to be recorded against certain lands owned by South Sound Properties Limited (the Company), as security for the loan. On 19th July, 1988 the Respondent filed a caution against certain parcels of land owned by the company in which he claimed an interest as the lender of money "......under an agreement dated 8th July, 1988 with South Sound Properties Limited for the loan of $390,000.00 and as a person entitled to a charge over the lands comprised in the above-mentioned parcels......"

It appears that the loan, or at least most of it, was not repaid and the company went into liquidation. The Respondent therefore claimed to be a creditor of the company, but proof of his claim in the sum of $595,061.00 was rejected by the Appellant, who concluded that both with respect to the loan agreement and the promissory note, Mr. Dolan was acting in his personal capacity and not on behalf of the company, and consequently the company was not liable for the debt.

By summons dated 18th February, 1991, the Respondent appealed to Williams J in Chambers against the decision of the Appellant. By a decision dated 17th November, 1992 the learned Judge came to the conclusion that the loan agreement was made between the Respondent and the Company, and that the Company was estopped from denying that Dolan was authorised to act on its behalf........ He allowed the Respondent's appeal, ordered that the decision of the liquidator be reversed and that the Respondent be admitted as a creditor of the Company. He thereupon remitted the matter to the Liquidator to take an account in order to determine the exact amount to which the Respondent is entitled. He also ordered that the Respondent's costs be taxed and paid out of the assets of the Company. In arriving at his decision the learned Judge stated, and we agree, that the fundamental issue in the case which fell to be determined was whether or not the loan was made to the Company with Dolan acting on its behalf, or whether this was a personal loan to Dolan himself.

Order 64 rule 5 of the Rules of the Supreme Court which governs the time limits for appealing to this Court provides as follows:

"Time limits for appealing

> 5.- (1) Subject to the provisions of this rule and of rule 6, no appeal shall be brought after the expiration of six weeks from the date of judgment delivered or order made, against which the appeal is brought, provided that in the case of appeals -
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> > (a) against an interlocutory order or judgment the period shall be fourteen days, and where leave to appeal against such order or judgment is required fourteen days from the grant of leave;
> >
> > (b) against an order or judgment made in the matter of the winding up of a company, or in the matter of any bankruptcy, the period shall be twenty-one days.
>
> (2) An appeal shall be deemed to have been brought when the notice of appeal has been filed."

before 8 December, 1992. It was however filed on 29 December, 1992, i.e. on the last day of the normal six-week period for filing a notice of appeal in ordinary civil matters (Rule 5(1)); but twenty-one days after the notice should have been filed in this matter (Rule 5(1)(b).

On 14 January, 1993 the Appellant filed a notice of motion seeking the leave of this Court under the provisions of Order 3 rule 5 of the Rules of the Supreme Court to appeal against the judgment of Williams J notwithstanding that the time limit for doing so by the rules had expired. The explanation of the delay which is contained in the affidavit of Counsel who appeared for the Appellant in the Court below is that the mistake was due to the fact that Counsel was not aware of the time limit for the filing of appeals against judgments on orders made in the matter of winding up of a company. Counsel for the Respondent strenuously resisted the application and criticised the reason given for the delay. He also asked for an order for costs in favour of the Respondent in the event that the application was granted, and cited the case of **Barrow v Caribbean Publishing Co., Ltd. (No.2), 11 W.I.R. 176** in support.

The rules give this Court an unfettered discretion to extend the time in cases such as this if substantial reasons are shown. The question to be decided in this case is therefore, can the mistake of Counsel in the instant matter constitute a substantial reason for the application? I ought to add at this stage that the grounds of appeal filed with the application prima facie show good cause for making the application.

It is now well settled that the inadvertence or mistake of a solicitor can constitute a substantial reason for such an application if the circumstances of the particular case can justify making an exception to the rule (Mills v John, Civil Appeal No. 1 of 93, Grenada). The Court will not grant an indulgence due to pressure of work (**Casimir v Shillingford (1967) 10 W.I.R. 269**); neither will it exercise its discretion favourably unless it is satisfied that it was indeed the mistake of the solicitor which caused the delay (**Joell v Maduro and Stout, Civil Appeal No.** 3 of 1989, British Virgin Islands).

In this case the document would have been filed within the time limited for the filing of appeals if it had been an appeal from a judgment in an ordinary civil action. Counsel has deposed that he was not aware of the limitation imposed by Order 64, rule 5(1)(b); and that as soon as he became aware of the mistake he adopt the approach taken by Fraser, J.A. in **De Noirmont v F.A. Agostini Estates Ltd. (1972) 19 W.I.R. 328** and ask - should the appellant be made to suffer for this mistake. I venture to think not, especially as Counsel has otherwise been frank and generally energetic in pursuing this appeal.

I would therefore allow this application and order that the time for bringing the appeal be extended to 30th September, 1993; and that the Appellant must pay in any event the Respondent's costs in respect of the application.

N.J.O. LIVERPOOL,
Justice of Appeal

I concur

SIR VINCENT FLOISSAC,
Chief Justice

I concur

C.M.D. BYRON,
Justice of Appeal