IN THE SUPREME COURT OF QUEENSLAND   O.S. No. 48 of 1985

CHAMBERS

BEFORE MASTER WELD

BRISBANE, 11 FEBRUARY 1985

IN THE MATTER OF The Rules of the Supreme Court

- and -

IN THE MATTER OF an application by MAVIS JOAN HOWARD pursuant to O.90 r.6 of The Rules of the Supreme Court

JUDGMENT

MASTER: This is an application to extend time in relation to an appeal which the applicant desires to bring against a judgment after trial in the action. The judgment was delivered by the Central Judge in Rockhampton on 11 December 1984 and was entered on 7 January 1985. The time for institution of an appeal therefore expired, taking account of the Australia Day holiday, on 29 January 1985.

A notice of appeal was forwarded by the applicant's solicitors to their Brisbane agents on 16 January 1985, where it arrived on 18 January 1985. They omitted to forward the fee and were telephoned by the Brisbane agents on the 18th to send the fee. The fee was forwarded on 24 January 1985 but did not arrive until 30 January 1985. Upon that date it is deposed the Registry refused to accept a notice of appeal because it was out of time.

The application is made in Chambers and not to the Full Court. There is appropriate authority for that course over the years, but in view of what has been said recently, I think I should mention what appear to be the reported cases. Those in which such an application has been dealt with by a single judge are: Rhys Jones, McTaggart Birch Ltd. v. The Metropolitan Water Supply & Sewerage Board (1917) Q.W.N. 30; Mackie v. Mackie & Sorrenson (1951) St.R. Qd. 217; McLaren v. The Public Curator of Queensland & Anor. (1965) Q.W.N. 18; Queensland Trustees Limited v. Fawckner (1964) St.R. Qd. 153; Moi v. Fong (1976) Qd.R. 7 - all appeals from judgments of the Supreme Court and all dealt with under O.90 r.6. There have, however, been a number of such applications dealt with by the Full Court, of which the reported instances appear to be: Hastings v. Leonidas (1927) St.R. Qd. 392 referred to the Full Court by Macnaughton J. the appeal not having been set down in time under O.70 r.32 as it then was; Cullen v. Steen (1932) St.R. Qd. 192; Re: a Solicitor (1939) Q.W.N. 43 notice of appeal filed but appeal not entered as required by r.29 of Rules of Court under Queensland Law Society Act Baker v. McPhillips (1946) St. R. Qd. 12; King v. Bryant No. 1 (1956) Q.W.N. 51 referred to the Full Court by Philp J. the appeal not having been set down in time under O.70 r.32 as it then was; Middleton v. Freier & Ors. (1958) St. R. Qd. 356; William Collins & Sons Pty. Ltd. v. T. & T. Mining Corporation Pty. Limited (1971) Qd. R. 432; and a recent unreported decision of K.G.K. Constructions Pty.Ltd. & Whiteleg v. East Coast Earthmoving Pty. Ltd., Writ No. 5473 of 1982, delivered on 10 October 1984. All the foregoing cases were dealt with under O.90 r.6 and all were appeals from judgments or orders of the Supreme Court except as mentioned herein.

In Middleton v. Freier and Ors. (supra) Philp J., with whom Wanstall J. and Stable A.J. agreed, said at p.357 in an appeal which was an appeal from a Magistrates Court:

> "I suggest that when the appellant is out of time he should set down the appeal and notify the respondent that he intends to apply at the hearing for extension of time.

> If the respondent does not intimate that he will consent to such an application the appellant should timeously file and serve an affidavit in support of his application or at least warn the respondent of the grounds of the application."

His Honour in the immediately preceding paragraph had said that when such an appeal is to the Full Court it is only that court which can enlarge time citing the Annual Practice 1958 p.1814. The time had already expired in that case. It may be that before its expiry a judge or master in Chambers could extend time.

In K.G.K. Constructions Pty. Ltd. and Whiteleg v. East Coast Earthmoving Pty. Ltd., the members of the Court were the Chief Justice, Sheahan J. and McPherson J., the Chief Justice and Sheahan J. concurring with the reasons of McPherson J., who in an appeal from an order by a master refusing to extend time to appeal against an order made in Chambers said:

> "A jurisdiction to entertain such an application is conferred by R.S.C. O.70 r.4, which after specifying times within which the notice of appeal must be served, concludes in r.4(3) with the words 'or (3) in either case within such extended times as the Court or a Judge may allow'. Despite the terms of that sub-rule, it has certainly been my experience that applications for extensions of time within which to appeal have consistently been made to and considered only by this Court, commonly in conjunction with the hearing of the appeal itself or immediately upon the commencement of the hearing of the appeal. That effects a saving in the time and expense of having the substance of the matter considered twice. It also avoids the need to consider whether the discretion to extend or not to extend the time for appeal has been properly exercised. In my view, and except in unusual cases, that practice should continue to be followed."

While the present case is one of very close similarity with the facts in Moi v. Fong, and is not unusual, I think the proper course is to follow the course of which McPherson J. spoke. The appropriate order, therefore, is

that the present application be referred to the Full Court. I think, for the guidance of the Registry in this case and perhaps generally, it should be observed that a notice of appeal should not be rejected because it is out of time and that the notice of appeal, which the present applicant has sought to file, or with a modification to it, to provide for the present application ought to be permitted to be filed if the present applicant so desires.

The costs of the present application should, I think, be reserved to the Full Court or in the event of the matter not being carried to the Full Court an order by a judge or master - do you wish to say anything further?

MR.MARTIN: No.

MR.HOARE: Master, if I could be heard on the question of costs, I am aware of the fact that you had made an order as to costs, but with respect, I would respectfully submit that we have been brought here to this Court as a result of the neglect of the applicant, and specifically in response to a request or an application which they have made, and it is, perhaps, possible that if the matter were to be heard by the Full Court we may be unsuccessful on the hearing of the appeal and we may be prejudiced before that Court on the issue of costs. I would respectfully submit it would be appropriate for you to specifically dispose of the question of the costs of this application now rather than to leave them in the air. What I am getting at is if the application - what one would anticipate that on the hearing of the appeal the application and the appeal itself will be heard on its merits, and if the appeal is to be allowed on its merits the application will be allowed in which event the costs of the appeal will have to be borne by us, anyway.

MASTER: I do not know whether that is so because for example, Middleton v. Freier, Philp J. said:

> "Of course, the applicant would have to meet the costs of the application to extend time."

MR.HOARE: I appreciate that, Master, and perhaps for the future it may be appropriate, but what I am concerned with is that in this case we have been brought here in response to a specific application that has been made. We have had to come here. That is quite distinct from the type of situation that might arise where there is an application to extend time. That is, in fact, in the body of the notice, of appeal and it is then heard by the Full Court. It would, with respect, be our submission that it would be imposing, really unnecessarily; a burden on the Full Court to have the judges in the Full Court consider the way in which the costs of this application should be disposed of because, with respect, it would seem to us that it must, no matter what the result of the Full Court, be borne by this applicant who brought us here because he failed to comply with the Rules.

MASTER: There are other considerations touching on that, I think, and they are that your client was content to argue the matter in Chambers and did not raise this question which I have raised having looked at the authorities.

MR.HOARE: Quite, Master, but we still had to come here. We still had to come here in response. We would have had to come here in any event. A summons was filed - we were served with a summons and we were obliged to come here which is simply our submission, that through no fault of our own, we have been brought here and those costs should be borne, at this stage, by the applicant. I certainly take your point, Master, and I do not raise the submission with any disrespect, but it would seem to us to be somewhat unfair, in my submission, to have the question of costs left, as it were, in limbo and we would submit that in fairness to my client those costs should be paid by the applicant. Certainly, as I recall on Friday, Mr. Martin conceded that he would not be opposing our application for costs. Those are my submissions.

MASTER: Do you wish to say anything, Mr. Martin?

MR. MARTIN: No, thank you, Master.

MASTER: I will rescind the order for costs of this I application and order that the costs of this application before me of the respondent be taxed and paid by the applicant.