8th July, 1988.

IN THE COURT OF APPEAL

88/12

Before Mr. V.A. Tomes, Deputy Bailiff
(Single Judge)

Between N Appellant

And H Respondent

Advocate R.J. Michel for Appellant
Advocate J.C.K.H. Valpy for 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, within which to lodge the Appellant's case, notwithstanding that the application is not made until after the expiration of the time appointed.

The relevant Rules or parts of Rules are these:-

"3. Every notice of appeal shall be served within one month from the date on which the judgment or order of the court below was pronounced.

"4-(1) The appellant shall, within seven days after service of the notice of appeal....apply in accordance with this Rule to set down the appeal.

(3) Upon application being made..., the Judicial Greffier shall file the copy of the notice of appeal and cause the appeal to be set down in the list of appeals.

"7. As soon as an appeal has been set down, the Judicial Greffier shall cause the official shorthand note of the proceedings at the hearing, or of so much thereof as the Court or the court below directs, to be transcribed and shall furnish to the appellant a copy of the transcript thereof.

"8-(1) At any time before the expiration of four months after the day on which the appellant has received from the Judicial Greffier the copy of the transcript of the official shorthand note, he shall lodge with the Judicial Greffier four copies of -

(a) to (e) inclusive - certain documents and any exhibits

(f) the contentions to be urged and the authorities to be cited by the

appellant in support of his appeal (hereinafter referred to as "the appellant's case".

"10. 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.

"16-(1)The Court or a judge thereof shall have power to enlarge the, time appointed by these Rules,....for doing any act....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..,."

Background

The parties were remarried (having been previously married and divorced) in Florida, United States of America, in October, 1980. The Respondent filed a Petition for divorce on the 2nd June, 1984. On the 23rd July, 1985, he was granted a Decree Nisi. In the meantime, on 6th November, 1984, the Greffier Substitute had made an Interim Order by consent that the Respondent should pay to the Appellant the sum of £200 per week, until further order.

Subsequently, the Appellant sought an award of a lump sum payment, secured provision, contribution for support and transfer of property. The Respondent pleaded that the Appellant should be precluded from receiving an award because of her conduct and, moreover, even if the Court were not to accept his submission then his assets were such that it would be inequitable to make any award. He also sought the discharge of the Interim Order.

That dispute came before the Matrimonial Causes Division - Inferior Number - and the Judgment of the Court was delivered on the 3rd September, 1986. The Court, in all the circumstances of the case, and having regard to the parties' conduct, came to the conclusion that it would be repugnant to justice to allow the Appellant any share in the Respondent's assets and to make

an award to her. Accordingly, the Interim Order was discharged and the Appellant's application was dismissed. Each party was to pay his or her own costs.

Mr. Michel was instructed to prepare and serve a Notice of Appeal against that decision. The Notice of Appeal was served upon the Respondent on the 1st October, 1986. The appeal was set down on the 6th October, 1986 and the Assistant Judicial Greffier so informed Mr. Valpy on the same day.

In the meantime, Mr. Michel had written to Mr. Valpy on the 30th September, 1986, forwarding, as a matter of courtesy, a copy of the Notice of Appeal. The last paragraph of that letter reads as follows:-

"I feel that I also should advise you that my client, on advice, after careful consideration of all the evidence given in these proceedings has decided to formally complain to the States of Jersey police that your client, during the course of his evidence, on oath, both orally and in writing, committed perjury. At the time of writing, I do not know what decision the States of Jersey police have made upon this complaint nor the potential consequences thereof, but I assume, that in the event that they decide to investigate the complaint, then this Appeal will be stayed pending the conclusion of that investigation and any consequential trial".

The next step occurred on the 16th December, 1987, when the Assistant Judicial Greffier wrote to the parties enclosing the transcript of the proceedings. The Assistant Greffier stated that: "The period of four months prescribed by Rule 8 of the Court of Appeal (Civil) (Jersey) Rules, 1964, will commence to run from to-day's date". It follows that the time appointed by the Rules for the lodging with the Judicial Greffier of the Appellant's case expired on the 16th April, 1988.

Nothing more transpired until the Appellant's Summons, dated the 25th May, 1988, for the hearing of the 30th June, 1988, when I reserved Judgment until

Affidavits

By a practice instruction of the 3rd September, 1986, the learned Bailiff said that "it would be better in future if applications for extensions of time are indeed supported by affidavits of the parties themselves...."

The Appellant has failed to comply with that practice instruction because the Affidavit in support of the Appellant's application is not sworn by her but by Mr. Michel, as the Advocate having the conduct of the Appeal on her behalf.

Mr. Michel deposes that by letter dated 29th September, 1986, he received from his instructing solicitor two letters, one addressed by the Appellant to the States of Jersey Police, the other by her to himself, relating to her allegations of perjury against the Respondent. Copies of the letters are exhibited to the Affidavit. Subsequently, Mr. Michel had had several conversations with Officers of the States of Jersey Police, delegated to investigate the allegations and had made available to them, at their request, copies of various documents. He had been last interviewed by the States of Jersey Police Officers investigating the matter on Monday, 16th May, 1988, when he was informed that the Police had completed their investigations and were preparing a report for submission to H.M. Attorney General for his decision as to whether or not to formally charge the Respondent with perjury. Mr. Michel was not aware as to whether or not the report had been concluded, and if so, whether it had been submitted to the Attorney General and if so, whether he had reached a decision thereon. However, in view of the general delays which had accompanied the investigation of the case, which had not received the highest priority, it seemed unlikely to Mr. Michel, if the report had been prepared and submitted to the Attorney General, that he had yet examined the report and arrived at a conclusion. Mr. Michel went on to depose that the delays which have accompanied this Appeal, both in the preparation of the transcript which was not available until more than fourteen months after the date of the Judgment and the investigation of the allegation of perjury by

the States of Jersey Police, have not in any way been the fault of or caused by the Appellant and that she has in no way been responsible therefor. Mr. Michel submits that, under the particular circumstances of this case, the Appellant should be granted an extension of time within which she be allowed to file and serve the Appellant's case, so that, before so filing and serving, she may know whether or not the States of Jersey Police and H.M. Attorney General intend to prosecute the Respondent for the alleged perjury because, in the event that they do so decide and in the event that the Respondent were to be convicted, that conviction would raise grave doubts over the veracity of the evidence given by the Respondent at the hearing, upon which evidence the Court substantially relied, in arriving at its decision.

I have to say that the Affidavit falls short of a full explanation for the delay in lodging the Appellant's case. It is only by inference that one arrives at the conclusion that the delay, at least initially, has been deliberate, because the Appellant was waiting for the result of her complaint to the States of Jersey Police, and that, on the basis of the Affidavit, there is no other reason for the delay.

The complaint to the States of Jersey Police, annexed to the Affidavit, refers to Affidavits relating to the Respondent's financial circumstances, to a list of specific questions prepared by the Appellant's lawyers dealing with the Respondent's financial affairs, his replies being supported by an Affidavit and his evidence about his financial affairs under examination in chief and under cross-examination. It goes on to allege that with reference to both his Affidavit evidence and oral evidence and in particular when dealing with his shareholding in Central Manufacturing and Trading Company Limited, the Respondent gave evidence which was false.

I question whether Mr. Michel is justified, in paragraph 6 of his Affidavit, in saying that in the event that the Respondent were to be convicted of perjury the conviction would raise grave doubts over the veracity of the Respondent's evidence upon which evidence the Court substantially relied. The

matter of the Respondent's finances was only the second limb of his defence. The first limb was that the Appellant should be precluded from receiving an award because of her conduct.

The Court, at page 4 of the judgment, says that "A good deal of the evidence which the Court heard was directed to ascertaining the husband's means. It was claimed by the wife that he had squandered a considerable fortune and that he had hidden assets. He had disclosed fewer shares in his father's family firm than he had held, and that, as a result, he should have available to him now some £200,000 more than his Affidavit of Means suggested". The Court went on to say that: "If the wife has conducted herself so as to make it unjust for the Court to award her anything, then an examination of the husband's means and a decision as to whether, in fact, he has more than he originally disclosed in his Affidavits, becomes unnecessary". It is clear, therefore, that the Court did not substantially rely on the evidence of the Respondent as to his financial circumstances. A careful examination of the Judgment shows that the sole "ratio decidendi" was that of conduct; on that question, much of the evidence was agreed, on at least one matter the Court preferred the evidence of the Appellant and on another it relied on the independent evidence of Mr. Mason. I do not find, therefore, that the Court substantially relied on the evidence of the Respondent. In many respects, the facts relied upon by the Court were admitted and spoke for themselves.

In her letter of complaint to the States of Jersey Police the Appellant says: "....however, I am lodging Notice of Appeal against that decision and will be pursuing my Appeal." The Affidavit fails to explain why she changed her mind and decided, instead of pursuing her Appeal, to await the outcome of her complaint.

The affidavit of the Respondent, on the other hand, does comply with the Practice Instruction because it is that of the Respondent himself. It contains, on oath, an emphatic denial of perjury and of any failure to make a full and frank disclosure of all assets and income. It also claims hardship caused by the delay, which is a factor to be taken into account.

The Law

In A.C. Gallie Limited -v- Davies and anor., 14th April, 1986 (as yet unreported) I reviewed a number of authorities. Firstly, page 15 of the "White Book" and in particular the notes to *Rule 3/5/1* containing a *useful summary of* the "old cases". Secondly, Revici -v- Prentice Hall Incorporated (1969) 1 All E.R. 772 C.A. and Ratnam -v- Cumarasamy (1964) 3 All E.R. 933 P.C. And thirdly two Jersey cases, Jersey Demolition Contractors -v- The Resources Recovery Board 1985-86 J.L.R. 77 and Holderness (née Waring) -v- Holderness 1985-86 J.L.R. N-2 - (otherwise unreported). *I do not propose to review those* authorities again in detail. At page 6, I said:-

"For my part I do not find it very difficult to reconcile the several cases:-

1) 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. It is a very general power in the Court to extend time whenever the Court thinks it just to do so.

2) Excessive delay may induce the Court in its discretion to refuse to extend the time.....

3) There must be a sufficient explanation of the delay to justify an extension of time....

The crux of this matter, therefore, is that I have to decide whether in all the circumstances of the particular case, and in the exercise of my discretion, it is just to enlarge the time as requested. As Lord Guest said in Ratnam -v- Cumarasamy there must be some material on which the Court can exercise its discretion; and it is entirely a matter of discretion whether or not the material advanced is sufficient to justify an extension of time."

Nevertheless, I have re-read all the authorities and, on reflection, perhaps I gave insufficient emphasis to the report of Ratnam -v- Cumarasamy where the Privy Council commented on the judgment of Bramwell, L.J. in Atwood -v- Chichester. The report, at page 935, said this:-

"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." In the instant case too, the Appellant has had her trial and lost.

Mr. Valpy urged me to have regard to the merits of the appeal. This raises a very interesting and difficult question.

In Atwood -v- Chichester (1878) 3 Q.B.D. 722, one of the "old cases", the merits of the defence were undoubtedly taken into account (see page 724).

In Jersey Demolition Contractors Limited -v- The Resources Recovery Board (supra), Sir Frank Ereaut, the then Bailiff, rejected that argument. At page 81, he commented on the following extract from Ratnam -v- Cumarasamy, (to which I have already made reference) at page 935:-

"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 the purpose of the rules which is to provide a timetable for the conduct of litigation. The only material before the Court was the affidavit of the appellant....."

Sir Frank Ereaut said this:-

"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 learned Bailiff, at page 84, said "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".

Mr. Valpy submitted that, on this point, the learned Bailiff in Jersey Demolition Contractors Limited -v- The Resources Recovery Board was mistaken and he sought to persuade me to have regard to the merits in the instant case. He omitted to draw to my attention, perhaps tactfully, that in A.C. Gallie Limited -v- Davies and anr. (supra), having cited the above extract from Jersey Demolition Contractors -v- The Resources Recovery Board, I said: "I respectfully concur."

Two further cases were cited to me which were not cited to the learned Bailiff in Jersey Demolition Contractors Limited -v- The Resources Recovery Board. Nor were they cited to me in A.C. Gallie Limited -v- Davies and anor.

The first of these is C.M. Van Stillevoldt BV -v- El Carriers Inc. (1983) 1 All E.R. 699.

That case concerned an application to extend the time for setting down an appeal and not for lodging an appellant's case. The ratio decidendi of the case is apparent from the headnote, at page 700:-

"Adherence to the timetable provided by the rules of court is essential to the orderly conduct of business in the Court of Appeal. In particular ,the setting down of an appeal in time is a vital step in proceedings because it informs the registrar's office that an appeal is in fact effective. The Court of Appeal will therefore ensure, for the benefit of all litigants, that the timetable provided by rules of court is adhered to by litigants and that the business of the court is conducted in an expeditious and orderly manner".

Griffiths L.J., who sat as single Lord Justice, at page 703 said this:-

"It cannot be overstressed that adherence to the timetable provided by the rules is essential to the orderly conduct of business in the Court of Appeal. The setting down of an appeal is a vital step because it is this step that informs the registrar's office that an appeal is in fact effective. The decision of the Court of Appeal in Revici -v- Prentice Hall Inc. (1969) 1 All E.R. 772, (1969) 1 W.L.R. 157 has already drawn attention to the importance of solicitors adhering to the timetable provided by the rules of court; and I take this opportunity now to warn the profession that the attitude of the court to the previous lax practices is hardening in order to ensure for the benefit of all litigants that the business of the Court of Appeal is conducted in an expeditious and orderly manner."

That part of the judgment deals with general principles. Perhaps the setting down is more vital than the lodging of the appellant's case and that less strict adherence to the timetable can be permitted in the latter. But there is a strong warning that the attitude of the court is hardening and I think there is an argument for the hardening of attitudes in this jurisdiction also for the benefit of all litigants. But Griffiths L.J. then refers to the factors to be taken into account in deciding an application of this kind:-

"The registrar, in my judgment, took into account all the relevant matters when approaching the determination of the application before him. He stated them in the following words:

'In my judgment, all the relevant factors must be taken into account in deciding how to exercise the discretion to extend time. Those factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal (my underlining) and the degree of prejudice to the defendant if time is extended'."

The second case is Palata Investments Limited and others -v- Burt and Sinfield Limited and others (1985) 2 All E.R. 571. That case concerned an extension of time for appealing. The headnote says:-

"....the discretion of the Court of Appeal is unfettered and will be exercised flexibly and with regard to the facts of the particular case. Where the delay is very short and there is an acceptable excuse for it, the court will not as a general rule deprive the appellant of his right of appeal, and in such a case it will not be necessary for the court to consider the merits of the appeal".

The Court of Appeal in that case comprised Ackner, Robert Goff and Browne-Wilkinson L.J.J. and the dictum of Griffiths L.J. in C.M. Van Stillevoldt BV -v- El Carriers Inc. was not followed. At page 521, Ackner L.J., who delivered the judgment of the Court of Appeal said this:-

"....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 exphasise 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 may be 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 Supreme Court Practice 1988 (The "White Book"), at page 868, on the question of extension of time for setting down includes notes on more recent cases:-

"In Rosalie Company S.A. v. Khalid, Neill L.J. (sitting as single Lord Justice on June 20, 1985) gave judgment in open court on an application for an extension of time for setting down an appeal. Neill L.J. applied the factors listed in C.M. Van Stillevoldt BV v. El Carriers Inc., subject, in the case of the question of the merits of the proposed appeal, to the qualification introduced by the Palata case, repeated the warning given by Griffiths L.J. in the Stillevoldt case about the importance of adhering to the time limits prescribed by the rules, and held that an extension would not normally be granted where the delay in setting down was lengthy.

"In Hollis v. R.B. Jenkins, The Times, January 31, 1986, the full Court of Appeal, when refusing an extension of time for setting down where there had been a long period of delay, again repeated the warning given by Griffiths L.J. in the Stillevoldt case, and stated that solicitors and their clients, especially those acting for parties where insurers were the effective defendants, ought always to have the time limits in mind."

I have to accept, therefore, that in certain circumstances the merits of the appeal is a factor to be taken into account and, to that extent, I was wrong in A.C. Gallie Limited v. Davies and anor. I reiterate my words at page 7 of that case: "The crux of this matter, therefore, is that I have to decide whether, in all the circumstances of the particular case, and in the exercise of my discretion, it is just to enlarge the time as requested" but all the circumstances of the particular case are to include all the factors approved by Griffiths L.J. in the Stillevoldt case, subject to the qualification introduced by the Palata case.

Mr. Valpy referred me to Watt or Thomas -v- Thomas (1947) A.C. 484 H.L. as a guide to the consideration of the merits in the instant case. In that case their Lordships held that when a question of fact has been tried by a judge and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. At page 490, Lord MacMillan said this:-

"My Lords, a court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct..... The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is the evidence of the demeanour of all witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court.... If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge".

And at page 492, Lord Simonds said this:-

"I suppose that if ever there was a class of case, in which an overwhelming advantage lies with the judge who has the witnesses before him, it is in the arena of connubial infelicity and discord. To me, as I read through those many pages of evidence, once and again the reflection occurred: would that I could have seen the witness and heard his voice as he said this or that. I do not think that with only the cold written word to guide me I should have

come to a different conclusion from that of the Lord Ordinary. Much less do I think that there is any justification for doing so when he has enjoyed the important advantages denied to an appellate court."

I shall return to Watt or Thomas -v- Thomas later when I consider the merits of the appeal as one of the factors in my determination.

'Le Criminel tient le Civil en état'

I have to consider whether this ancient maxim of our common law has any application in the instant case.

Le Geyt, in his "La Constitution, Les Lois et Usages de Jersey" Tome I p.95 says that:-

"A Jersey l'on a beaucoup de penchant pour décider premièrement du crime, et c'est presque une règle générale, quelque peu de rapport que le crime ait avec la cause civile. Cependant il faut bien que celui des deux intérests, de la décision duquel l'autre dépend, se vuide le premier; et souvent il arrive que le Criminel emporte quelque chose de préjudiciant..... S'il n'y a point de telles dépendances, le plus important doit estre preféré.... Ainsi l'instance pour le mariage doit être prejugée avant celle de Terrien, et l'instance de Rapt, quand il est capital, avant la question de la validité du mariage."

The gist of the passage is that it is a general rule that the criminal issue is determined before the civil, but that this is subject to exceptions. The first is that if one of the actions depends upon the decision in the other, then it is the latter which is taken first. The other is that if one of the actions is more important, the more important is taken first. Le Geyt then goes on to illustrate what he means, and he seems to be saying that an action about a marriage will be decided before an action relating to land (Terrien = celui qui possède des terres), presumably as an example of a type of action which is less important than one relating to marriage. Conversely, if out of the same facts,

there arises (i) a question touching the validity of a marriage, and (ii) a possible charge of rape if the marriage was not valid, then the rape, if it was in circumstances which made the offence capital, would be tried first. (I have examined Le Geyt's manuscript and "Terrien" is not a mis-transcription; but I do not think that the reference to Terrien is a reference to the commentator of that name; I think that it is, like the reference to Rapt, a reference to a type of action.)

But Mr. Valpy referred me to Le Moine -v- Asplet (1856) Ex 178. The case is an interesting and, indeed, entertaining one involving a complaint by Advocate Le Moine that he had been assaulted in the Royal Square by Centenier Asplet of St. Helier. The assault was, undoubtedly, a grave and criminal one involving punching, kicking, smashing of spectacles and use of a walking-cane, together with foul and abusive, even if in the French tongue picturesque, language. Advocate Le Moine was also a journalist and, by reason of his injuries, the publication of the "Impartial" was interrupted. By means of a "Remontrance" (a form of action known to we older practitioners) Advocate Le Moine sought damages. In those days the law required him to sue within a year and a day of the incident and he did so. Centenier Asplet pleaded that the Remonstrance could not enter and that he could not be called upon to answer to it because he had been arrested by the Connétable of St. Helier and thus had to answer to a criminal accusation at the instance of the Attorney General based on the same facts, which prosecution was not yet terminated. The Court decided that a criminal prosecution could not debar a plaintiff of his right to claim damages for tort from the party complained of. The Court ordered that the Remontrance enter (be lodged). But the Court, acknowledging that it could not appreciate the nature or the extent of the facts alleged in Advocate Le Moine's civil action until the criminal action had been concluded, suspended (stayed) the civil action until the prosecution had been completed.

It is the 'decision' of the criminal proceedings that must take precedence. Thus, applying that principle to the instant case, there was nothing to prevent the Appellant's case being lodged. As Mr. Valpy said, the

four month period allowed for the lodging of the Appellant's case is akin to prescription, as in the case of the year and a day for Advocate Le Moine's Remonstrance, except that Rule 16(1) makes possible an enlargement of time.

I rule, therefore, as I think Mr. Michel effectively conceded, that the Appellant cannot rely upon the ancient maxim.

I now proceed to consider the individual factors that are to control my determination of the application:-

Length of delay

The Appellant's case should have been lodged by the 16th April, 1988. The Summons for an enlargement of time was dated the 25th May, 1988, and the hearing took place on the 30th June, 1988. If, in fairness to the Applicant, one takes the 25th May, 1988, plus say one week for the earliest hearing date, one arrives at a delay of some seven weeks.

That is not a short delay, e.g. in the Van Stillevoldt case, per Griffiths L.J.: "....the length of the delay is short: we are dealing with a matter of days, not weeks or months"; in the Palata case, per Ackner L.J., "a matter of only three days".

Nor is it an inordinately long delay, e.g. Jersey Demolition Contractors Limited -v- Resources Recovery Board, per Sir Frank Ereaut: "The appellant company conceded that the delay of 21/2 years was excessive....".

In Revici -v- Prentice Hall Inc. the plaintiff had 31/2 months in which to lodge his notice of appeal and he did not do so. However, at the time of the refused application it was only a month since the last extension. Lord Denning M.R. said: "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."

In Ratnam -v- Cumarasamy the record of appeal should have been filed on or before April 14th, 1962. On April 18th, 1962, the appellant's solicitors applied for an extension of time for filing the record of appeal to fourteen days from the date of the order to be made. It was stated on the appellant's behalf that to grant the application would not involve any postponement of the date of hearing. The Court of Appeal dismissed the application. The House of Lords dismissed the appeal.

In my judgment the delay in the instant case is neither short nor inordinately or substantially long; but it is lengthy.

The reasons for the delay

There are but two reasons for the delay in the instant case; the first is that to be inferred from the Affidavit, i.e. that the delay has been deliberate, because the Appellant was awaiting the result of her complaint to the States of Jersey Police; the second is that Mr. Michel was to apply for an enlargement of time before the expiration of the four month period appointed by the Rules for the lodging of the Appellant's case, but forgot to do so, a reason not covered by his own Affidavit.

I have to deal with a number of points of greater or lesser significance and I do so in no particular order:-

1) Even if no more than by inference it is claimed that the delay in the preparation of the transcript is in some way an excuse for delay on the part of the Appellant; I reject this; I agree with Mr. Valpy that the longer the Judicial Greffe took to prepare the transcript, the longer the Appellant had to focus upon the requirement of Rule 8(1); it seems to me that a considerable amount of work could have been done on the preparation of the Appellant's case in advance of the transcript.

2) The delay in the Police investigation is not a sufficient explanation of the delay to justify an extension of time; it was open to the Appellant to file her Appellant's case notwithstanding the investigation and, as has already been said, there was no rule of law, such as "le criminel tient le civil en état" to prevent it; it would have been a simple matter to include in the Appellant's case a recital or description of all the falsehoods alleged against the Appellant; whilst a successful prosecution might well assist the Appellant to establish those falsehoods, that would be a reason for seeking to defer the hearing of the Appeal and not a sufficient reason for failure to lodge the Appellant's case; whilst the Court of Appeal (Civil) (Jersey) Rules, 1964, contain no provision for adjournments, other than in Rule 11 where directions are given for service of the notice of appeal on other parties or persons, I have no doubt that the Court of Appeal can adjourn the hearing of an Appeal from time to time; I have recent experience of one such adjournment; the right is clearly recognized in England, although an application to postpone the hearing of an appeal or application will not be granted as matter of course, even if made by consent, but some good and sufficient reason must be shown; (see Bird -v- Andrew, (1887) 4 T.L.R. 7; Unilever Computer Services Ltd. -v- Tiger Leasing S.A. (1983) 2 All E.R. 139, C.A.). Article 12(1) of the Court of Appeal (Jersey) Law, 1961, provides that:-

"There shall be vested in the Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter".

Article 12(3) of the same Law provides that:-

"For all the purposes of and incidental to the hearing and determination of any appeal....the Court of Appeal shall have all the power, authority and jurisdiction of the Royal Court...."

Article 15 of the same Law provides that:-

"The jurisdiction vested in the Court of Appeal under this Part of this Law shall, so far as regards procedure and practice, be exercised in the manner provided by this Law or by rules of court, and, where no special provision is contained in this Law or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which the Superior Number of the Royal Court might hitherto have exercised jurisdiction on an appeal from the Inferior Number thereof."

Article 18(1) of the same Law provides that:-

"In any appeal pending before the Court of Appeal under this Part of this Law, any matter incidental thereto not involving the decision of the appeal may be decided by a single judge of the Court, and a single judge may at any time make any interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit."

In my opinion it is beyond dispute that the Royal Court has an inherent jurisdiction both to adjourn proceedings from time to time and, in appropriate cases to 'stay' proceedings; the power to postpone or adjourn a trial or hearing is formalised in Rule 7/5 of the Royal Court Rules, 1982. Thus, I have no doubt that the Court of Appeal has the power to postpone or adjourn the hearing of an Appeal. It follows, in my judgment, that the Appellant had no sufficient reason or excuse for failing to prepare her Appeal to the point where it was ready for hearing.

3) The Appellant, by her own acts, demonstrated an intention to proceed to the hearing stage, albeit it might become necessary to seek a 'stay' or adjournment of the hearing. (see Advocate Michel's letter of the 30th September, 1986 - "....I assume,....this Appeal will be stayed" and the Appellant's letter to the States of Jersey Police - "....however, I....will be pursuing my Appeal.")

4) Mr. Michel submits that a successful prosecution of the Respondent for perjury could give rise to the opportunity to amend the Notice of Appeal in order to seek a re-hearing, i.e. a new trial. I do not accept that amendments to the Notice of Appeal would be necessary - the Notice already asks that the Court of Appeal set aside the Judgment appealed against. Article 12(3) of the Court of Appeal (Jersey) Law, 1961, which I have already cited, continues:

"....and shall have power, if it appears to the Court that a new trial ought to be had, to order that the verdict and judgment be set aside and that a new trial be had".

The only restrictions on the Court of Appeal's power to order a new trial are to be found in Rule 13 of the Court of Appeal (Civil) (Jersey) Rules, 1964 - for a new trial to be ordered there must be, in the opinion of the court, "some substantial wrong or miscarriage". In my judgment, the Court of Appeal is not restricted to making such an order only in pursuance of an application for a new trial; it has an unfettered statutory power where, in its opinion, there is some substantial wrong or miscarriage. Therefore, the preparation and lodging of the Appellant's case, on the basis of the original Notice of Appeal, could not have deprived the Appellant of the opportunity of a new trial.

5) The only sworn material before me in support of the allegation of perjury is the fact that the allegation has been made by the Appellant in an unsworn letter of complaint. Mr. Michel does not even depose that the allegation is, in his opinion, justified; he went no further than to say, in his address to me, that the complaint was made "on advice". There is no material before me to show the extent of the alleged perjury, i.e. the actual statements made that are alleged to be false. Perjury has to be proved literally or substantially as set out. On the other hand, I have before me the Affidavit of the Respondent in which he has emphatically denied the complaint and has supplied evidence to the Police to support his denial.

(6) Mr. Michel says that he intended to apply for an enlargement of time before the 16th April, i.e. before the four month period appointed by the rules had expired; the matter completely slipped his mind; he completely forgot and was reminded of it only when, in May, he received a request from the police officers investigating the allegation of perjury to meet with them; he agreed to meet them on the 16th May and, on the same day the Appellant's Summons was prepared and delivered to the Judicial Greffe; a conscious decision was made not to file the Appellant's case but to apply for an extension of time but, in the event, the application for an extension of time was overlooked.

I am bound to observe that, had the application for an extension of time been made say midway the four month period, then, upon its refusal because the Appellant had misdirected herself about the effect of the complaint to the police, Rule 8(1) could still have been complied with within the appointed time.

An extension of time can be granted, in appropriate circumstances, even though the failure to act in time was due to a mistake on the part of a legal adviser (Gatti -v- Shoosmith (1939) 3 All E.R. 916 C.A.). However, in that case, owing to a misreading of the rule, the applicant was a few days too late in entering an appeal. The intention to appeal had been notified by letter within the time specified. The Court of Appeal held that there was nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; whether the matter should be so treated must depend on the facts of the case. In Gatti the delay was a very short one, only a matter of a few days. In the Palata case also the reason for the delay was a mistake on the part of legal advisers. I have not found any case where mere forgetfulness was proffered as a sufficient explanation for delay. Although I have every sympathy for Mr. Michel, I have to apply all the principles that I have already enunciated and I cannot find that mere forgetfulness constitutes a sufficient explanation. As the learned Bailiff said in Fontaine -v- Dowling Ex 23rd February, 1973 (unreported); the Appellant is really asking for indulgence. That I am willing to grant but not at the expense of someone else.

For all the reasons that I have enumerated, there is not, in my judgment, a sufficient explanation of the delay to justify an extension of time.

Whether there is an arguable case on the appeal

I find this question very difficult. The transcript has not been made available to me and I cannot see how I can reach a reasoned view on the merits without a detailed study of the transcript. At the same time I have to consider only whether there is an arguable case and I must not fall into the trap of appearing to decide the Appeal itself.

Insofar as the Appeal is on the facts, the case of Watt or Thomas and Thomas (supra) is persuasive authority. The authorities on appeals from a Judge's decision of questions of fact are well summarised in Order 59 Rule 1/28 at page 854 of the "White Book" and need not be recited here. Mr. Michel conceded that the Appellant would have an uphill task to fight the findings of fact by the trial Court - it was a difficult but not impossible hurdle; hence the reliance on alleged perjury.

For my part I do not see the issue of perjury as a major one because what is in dispute is the question of conduct and the weight to be given to it. The majority of the facts relating to conduct are not in issue; it is the interpretation of those facts e.g. the discretion statements by the Respondent and the failure of the Plaintiff to continue with her defences to the petitions, that is in issue.

Article 29 of the Matrimonial Causes (Jersey) Law, 1949, as amended by the Matrimonial Causes (Amendment No.3) (Jersey) Law, 1973, provides that "Where a decree of divorce....has been made, the Court may, having regard to the conduct of the parties to the marriage....order:- (a) that one party to the marriage....(shall make financial provision for the other party)...." The parties in the instant case had been twice married to each other and there is no doubt, from a careful examination of the Judgment, that the Court had regard to the

conduct of the parties to the marriages, i.e. both marriages. At page 8, the Court says this:-

"We have had to examine the allegations of the wife to see whether we can find that it was the husband's behaviour, in effect, that drove the wife into the arms of three, or possibly four, lovers, during both marriages."

Mr. Michel submits that the Court cannot have regard to conduct in the first marriage; that it can have regard only to conduct in the marriage subject to the proceedings; and that, therefore, as a matter of law, the trial Court misdirected itself as to the conduct of the parties "to the marriage". On the other hand, Mr. Valpy says that conduct between the same parties can be considered; that both marriages were dissolved on grounds of adultery and, therefore, there is an unavoidable nexus between them. Mr. Valpy referred me to the final page of the judgment where the Court found that: "The wife's attitude to adultery was indicated by her evidence and the manner in which she gave it. She seemed to think that, and we do not repeat her exact words which were difficult to understand exactly, but this was our impression; a small number of infidelities if related to and set against the length of the marriage could be acceptable provided they were not too numerous. That may well be the contemporary approach to marriage amongst young people, although we cannot be sure of this, but at any rate it sits ill in the mouth of a mature woman, as the wife is". Mr. Valpy further submitted that the Appellant's conduct on any view, even if related to the second marriage only, made it repugnant to justice to allow the Appellant any share in the Respondent's assets.

Neither Counsel cited any authority on this question and I do not feel able to decide it without being fully addressed upon it. Whether or not the Appellant's decision not to continue with her defences to both petitions, or to the second petition, was a matter to be taken into account may also involve a question of law.

Therefore I find myself unable to say, on the material before me, that the Appellant does not have an arguable case or that, in the words of Palata Investments v. Burt and anr., to extend the Appellant's time for lodging her case would enable her to pursue a hopeless appeal. On the limited material before me, I have formed the opinion that the notice of appeal, in certain respects, does not make altogether valid points but there is the issue of the two marriages which may give rise to an arguable case.

Degree of prejudice to the Respondent

The Respondent was re-married on the 3rd April, 1987. He has found it a great strain and a considerable hardship first to be faced with an allegation of perjury which has been hanging over his head since September, 1986, and, secondly, caused by this Appeal which has also been hanging over his head since the Notice of Appeal was first served on the 1st October, 1986.

Although the delay in the investigation of the allegation of perjury has not been in any way the fault of, or caused by, the Appellant, I consider that in the instant case the Respondent has suffered more than mere inconvenience; there is a degree of personal hardship. It is not necessary, in my opinion, that the Respondent should have suffered irreparable damage as a result of delay; hardship is sufficient. It is in the interests of all litigants that the business of the Court of Appeal be conducted in an expeditious and orderly manner. It is an important principle that all litigation must have an end. This is particularly so in the sphere of matrimonial causes. But the fact that a judgment which is otherwise final will be re-opened if the application is granted does not count as prejudice, because it is inherent in every application for an extension of time for appealing.

The Appellant has, since the date of the judgment, lived with John F. Billington, the Co-Respondent cited by the Respondent who is a "1(1)(K) immigrant" and lives at, and owns, Highland House, St. Lawrence, which he

acquired for over £1,000,000. The Appellant lives with Mr. Billington at Highland House.

In the exercise of my discretion, I consider that the prejudice to the Respondent, if the extension of time were granted, would exceed that which the Appellant will now suffer.

Conclusions

I consider the delay to be lengthy, the reasons for the delay to be insufficient and the degree of prejudice to favour the Respondent. Therefore, albeit that there may be an arguable case, I exercise my discretion in favour of the Respondent and refuse to extend the time.

I have given my reasons in some detail because it appears from the decision of the Court of Appeal in T -v- H (1987) as yet unreported, that Rule 16, in its terms, contains ample power for the Court of Appeal, sitting as a Full Court, to consider the matter 'de novo' on a fresh application.

The Appellant's Summons is dismissed. The Appellant will pay the taxed costs of the Respondent.

Authorities: (*:referred to at the hearing; ß:referred to in the Judgment)

ß* Court of Appeal (Jersey) Law, 1961.

ß* Court of Appeal (Civil) (Jersey) Rules, 1964.

ß* Practice Direction dated the 3rd September, 1986.

ß* Supreme Court Practice, 1988, Order 59 Rule 4.

ß Supreme Court Practice, 1988, Order 59, Rule 1/28.

ß Supreme Court Practice, 1988, p.868 : Rosalie Company S.A. -v- Khalid ; Hollis -v- R.B. Jenkins.

ß Matrimonial Causes (Jersey) Law, 1949 Art. 29, as amended by Matrimonial Causes (Amendment No.3) (Jersey) Law, 1973.

ß* Fontaine -v- Dowling : (23rd February, 1973): 1 C.of.A. p. 89.

ß* Waring -v- Holderness (1985) J.J. Unreported 85/88 (J.L.R. 1985-86 An. 2).

ß* Jersey Demolition Contractors Limited -v- Resources Recovery Board (1985-86 J.L.R. 77).

ß* A.C. Gallie Limited -v- Davies & Walker (1986) J.J. Unreported 86/7.

ß* T -v- H (1987) J.J. Unreported 87/3.

ß* Ratnam -v- Cumarasamy (1964) 3 All E.R. 933.

ß* Revici -v- Prentice Hall Incorporated (1969) 1 All E.R. 772.

ß* C.M. Van Stillevoldt BV -v- El Carriers Inc. (1983) 1 All E.R. 699.

ß* Palata Investments Limited -v- Burt & Sinfield Limited (1985) 2 All E.R. 517.

ß Atwood -v- Chichester (1878) 3 Q.B.D. 722.

ß* Watt or Thomas -v- Thomas (1947) A.C. 484.

ß Gatti -v- Shoesmith (1939) 3 All E.R. 916 C.A.

ß Bird -v- Andrew (1887) 4 T.L.R. 7.

ß Unilever Computer Services -v- Tiger Leasing S.A. (1983) 2 All E.R. 139 C.A.

On application of maxim "le criminel tient le civil en état"

ß* Le Geyt: "La Constitution, Les Lois et Usages de Jersey", Tome I, p. 95.

ß* Le Moine -v- Asplet (1856) Ex 178.