THE INSURANCE OFFICE OF AUSTRALIA LTD.

V.

THE COMMONWEALTH RAILWAYS COMMISSIONER

JUDGMENT

KITTO J.

12 of 1949

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The appellant applied to me on summons for an order under the second paragraph of rule 12 of Section III of the High Court Rules allowing an extension of the period within which the prescribed security for the costs of the appeal and notice thereof to the respondent might be given although the period of one month after the service of the notice of appeal had expired. I dismissed the summons and stated that I would give my reasons in writing. I now do so.

Rule 12 is in the following terms:

> "Within one month after the service of the notice of appeal, or within such further time as the Court or a Justice allows, or such other time as is prescribed by an order giving leave to appeal, the appellant shall give the prescribed security for the costs of the appeal, and shall give notice thereof to the respondent.
>
> The Court or a Justice may allow an extension of the period of one month although the application for such extension is not made until after the expiration of that period.
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> The prescribed security shall be given in the Court from which the appeal is brought. If the security is not given within the prescribed time, the appeal shall be deemed to be abandoned.
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> As soon as the prescribed security is given, the appeal shall be deemed to be duly instituted."

The notice of appeal was filed, and presumably served, on 24th August 1949. The prescribed security for costs should have been given by 24th September 1949, unless an extension of time had been granted by the Court or a Justice. The security was not so given, and no extension of time was applied for until the present summons was filed on 11th August 1950. Thus, for nearly eleven months the appeal has been deemed to be abandoned.

There is no doubt that rule 12 in its present terms enables the Court or a Justice to extend the time for giving security after that time has expired, and thus to enable the appeal to be revived even after such a lapse of time as has occurred in this case. But the power to do so is discretionary, and must be exercised judicially. An appellant asking for its exercise seeks an indulgence which is not available to him for the asking.

There is no occasion in this case to attempt any exhaustive statement of the principles upon which the discretion will be exercised in favour of an appellant. The guiding principle must be the avoidance of injustice, and there may be many cases, e.g. where the time has only recently expired and the respondent will suffer no prejudice, in which it may be proper to exercise the discretion somewhat benevolently. But in the present case I can see no ground for benevolence towards the applicant. For all that appears, the omission to give the security within time was deliberate. No explanation of it is offered. The only evidence which has any bearing upon the lapse of time is that the amount of the judgment appealed from was to a large extent re-insured by the appellant with re-insurers in London, that they have had to be consulted in connection with the appeal before proceeding with it, and that the appellant desires to proceed with the appeal.

It might as well be said that the appellant elected to abandon the appeal, but, after thinking the matter over for the better part of a year, has now changed its mind. The evidence states that the appellant is a company of substantial substance, and obviously there could have been no difficulty in giving the required security while consultations with the London re-insurers were being conducted. If the appellant had desired any lengthy period for such consultations, it could have given the security and asked the respondent's consent to the appeal not being set down for hearing in the meantime; and if the respondent had moved to have the appeal dismissed for want of prosecution, the appellant would have had an opportunity to show to the Full Court any

circumstances which it considered might entitle it to have further time allowed. But no such course was adopted. So far as appears, the respondent was completely ignored and allowed to assume that the litigation was at an end. There is not even any evidence to suggest that the omission to give the security was due to inadvertence or mischance, or that the appellant was not fully aware of the consequences of that omission. In the absence of such evidence I can only conclude that the appellant abandoned the appeal with its eyes open.

Even if the necessity or desirability of consulting the London re-insurers were proved and were relevant on this application, there is no evidence to explain why, in these days of aerial communication, the consultations need have taken so long.

It was urged on behalf of the appellant that the amount involved in the appeal is large, and that there are important questions raised by the notice of appeal. As to the amount involved, I can only say that an appeal in relation to so large a sum would not be likely to have been left for eleven months in a state of abandonment without a word being said to the respondent unless the appellant intended to abandon it. As to the questions raised by the notice of appeal, I am not in a position to form any opinion as to whether they are substantial questions, as I have not been favoured with a copy of the reasons given for the judgment appealed from.

The evidence in my opinion contains no material whatever upon which I could hold that the interests of justice would be better served by granting than by refusing the application. On the contrary, I think it would be most unjust to allow an appellant who has abandoned his appeal to revive it after the better part of a year, with no word of explanation except that after discussions with persons indirectly interested he has decided that he wishes to go on with it.

The appellant by its counsel offered to submit to any terms I might think proper to impose as a condition of granting

the application. In particular it was suggested that the amount of the security might be increased. The case, in my opinion, is not one in which the imposition of terms, either as to the amount of the security or otherwise, would remove the injustice of allowing the appeal to be revived.

For these reasons I dismissed the application with costs.