IN THE FIJI COURT OF APPEAL 282

CIVIL JURISDICTION

CIVIL APPEAL NO. 41 OF 1993
(High Court Civil Action No. 728 of 1984)

BETWEEN:

ATTORNEY GENERAL OF FIJI
DOCTOR HUBERT ELLIOT **APPELLANTS**

-and-

PAUL PRAVEEN SHARMA **RESPONDENT**

Mr. D. Singh and Mr. V. Rupeni for the Appellant
Mr. A. Gates for the Respondent

Date of Hearing : 23rd May, 1994
Date of Delivery of Judgment : 26th May, 1994

DECISION OF THE COURT IN RESPECT OF:

1. **AN APPLICATION BY THE APPELLANT FOR A STAY ORDER**, AND
2. **AN APPLICATION BY THE RESPONDENT TO STRIKE OUT THE APPEAL**

On 1 August 1982 the Respondent suffered a broken leg while playing soccer and was taken to the Colonial War Memorial Hospital in Suva. It is sufficient for present purposes to say that, as a result of gross and continuing negligence on the part of medical staff at the hospital the Respondent suffered prolonged pain and suffering and finally, having been taken to a hospital in Sydney, his leg had to be amputated below the knee.

He claimed damages from the Appellants. Liability on the part of the Appellants was admitted and the trial before Byrne J was confined to the question of damages. In a reserved judgment delivered on 27 August 1983 judgment was given for the Respondent for a total of $369,800 (in Australian currency).

On 5 October 1993 the Appellants gave notice of appeal against that judgment; and on the following day, filed a notice of summons for stay pending appeal. It should be mentioned that, prior to the hearing of the action four sums totalling $71,041 had been paid to the Respondent on an interim basis.

The summons for a stay was heard by Byrne J. on 11 November 1993 and resulted in an order being made on the same day for the payment by the Appellants to the Respondent of the further sum of $126,150 within 14 days and for a stay of execution pending appeal in respect of the balance of the judgment, namely $172,609. There was also an order for the issue by the Chief Registrar of the High Court of a Certificate under Section 20 of the Crown Proceedings Act, Cap. 24. That certificate was duly issued on 18 November 1993 and the Order of 11 November was sealed on 19 November 1993.

On 21 December 1993 a notice of summons by the Appellants for an order that the order of 11 November 1993 be set aside and that payment under it be suspended was attempted to be filed in the office of this Court, but for some reason which is not clear it was rejected. The messenger boy who took the document to the

Court officer has deposed that he was told it was rejected because the order had not been sealed. It had, however, been sealed on 19 November 1993.

On 12 April 1994, the Respondent filed a fresh notice of summons in the same terms as previously, namely for the setting aside of the Order of 11 November and for a stay. This was followed on 14 April by a notice of summons by the Respondent for the dismissal of the appeal on the ground of failure to comply with the Order of 11 November (that is, by payment of the sum of $126, 150).

The Order of 11 November and the certificate were served on the Appellants on 22 November 1993. It was not until 21 December that the attempt was made to file the notice of summons for setting the Order aside. This was outside the period of 14 days specified for payment. There then elapsed a further period of almost 4 months before the fresh notice of summons was filed. It is no doubt on this basis that the Respondent has moved to strike out the appeal.

On behalf of the Respondent it has been argued on several procedural grounds that the Court ought to decline jurisdiction to hear the present application. It is said that there was no right to file an application for stay, but only to appeal against the refusal of a single Judge to grant the previous application for stay. It was also argued that, even if the Court wished to treat the application as an appeal then that, too, ought not to

happen because, on any basis, the time for appealing had long since expired.

These submissions have been made at a very late stage and in the circumstances we have thought it preferable to deal with the application on the merits rather than upon any procedural or jurisdictional point. We are not, of course, to be taken as having decided such points one way or the other.

We deal later with the Respondent's application to dismiss the appeal.

The application for stay is made on two grounds, namely:-

1. That if the damages and costs awarded were paid then there is no reasonable probability of recovering them if the appeal succeeds.
2. That since an excessive sum of money was awarded in the Order of 11 November 1993 it is in the public interest that a stay be granted pending the hearing of the appeal.

We deal with these grounds separately.

1. The principle to be applied in cases of interim payments pending appeal is to be found in the longstanding case of **Atkin v. Great Western Railway Co.** (1886) 2 FLR 400 in this passage:

> *"... as a general rule, the only ground for such a stay was an affidavit showing that if*

the damages and costs were paid there was no reasonable probability of getting them back even if the appeal succeeded."

The only affidavit in apparent purported compliance with that principle is one made by Sunil Kumar, an Executive Officer employed by the Attorney-General. Mr. Kumar deposes that a total of $71,041 has already been paid to the Respondent; that, in his experience, in some cases where payments have been made it has been either impossible or very difficult to recoup payments later; and that he believes there is no reasonable probability of getting the payments back in this case.

No attempt has been made to give any facts as to why Mr Kumar holds that view, or as to what the Respondent's circumstances are or, indeed, to give any indication as to the basis for his belief. What is apparent from other evidence disclosed on the appeal is that the Respondent is a single man in regular employment as a hospital scientist at a Sydney hospital. He has a Bachelor of Science degree. It seems that he may well be able to make a refund if necessary, even if only over a lengthy period.

We can see no basis on the first ground for there to be a stay.

2. The second ground depends upon the assertion that an excessive amount was awarded by way of further interim payment.

Unfortunately, in the reasons given by Byrne J., there is no indication given of how the sum of $126,150 was made up nor is there any affidavit or other evidence appearing on the record from which that might be calculated.

The total award of general damages was $184,000. The additional amount to bring the total judgment up to $369,800 is accounted for by interest.

Without in any way wishing to give an indication of what may be the ultimate view on the appeal against the judgment, we think it is possible to make some observations on the subject of the damages awarded.

This was the case of a 19 year old man who was injured on 1 August 1982. There was admitted negligence in the treatment of his injuries, with the result that he was unable to pursue his chosen career but had to take less remunerative employment. His claim for future loss of earnings was therefore always likely to be substantial.

He suffered constant pain to a high degree for a period of some 11 years to the time of judgment and will continue to do so indefinitely. He had a leg amputated and suffered, and will continue to suffer, a corresponding loss of amenities and of enjoyment of life. Again, the amount to be awarded under these heads must always have been substantial.

The notice of appeal has challenged the amounts awarded for interest. These are, of course, very large amounts because of the long delay before an action could be commenced and reach a hearing. Undoubtedly interest of some amount was bound to be awarded and, on any basis, was bound to be substantial.

Having regard to these considerations this was always a case in which the amount of damages could not have been other than large. We emphasise that these remarks are not to be taken as providing any indication of the view which may in the end be taken on the merits of the appeal.

The effect of the Order of 11 November 1993 is that a total of $197,171 will have been paid to the Respondent. It is very difficult to see that, if this sum is found to have been excessive it is excessive to an extent beyond the reasonable probability of the respondent being able to repay any surplus.

The second ground must therefore also fail and the application to set aside the Order of 11 November 1993 is dismissed with costs. We direct that the sum of $126,150 is to be paid within 14 days of delivery of this decision.

On behalf of the Respondent Mr Gates has argued strongly that the appeal should at this stage be struck out on the grounds of the Appellants' failure to comply with the Order to pay $126,150.

Byrne J in the course of his Judgment considered the question of whether the Appellants could withhold payment until money had been appropriated by Parliament for the purpose. He held that, having regard to the provisions of s. 20(3) of the Crown Proceedings Act, Cap. 24 no such appropriation was required and payment ought to be made in terms of the Certificate of the Chief Registrar. There was no appeal against that finding and Mr Singh on behalf of the Appellant conceded that the finding was accepted as correct. In passing we note that, in terms of s.20(3), the Government's Chief Accountant "... shall ... pay to the person entitled .... the amount appearing by the Certificate to be due .... "

In these circumstances the failure of the Appellants to make payment and the continued default for a long period is a matter for very strong condemnation by this Court. There has been no ground shown which might have justified such a prolonged failure to comply with the Order of the Court. Having regard, however, to the very large amount of the Judgment we are reluctant to strike the appeal out at this stage. Instead, we propose to adjourn the application to strike out sine die. It may be brought on on 7 days' notice and there will be liberty to apply accordingly. We think we should add that, if there should be further default on the part of the Appellants then, when the matter comes before the Court again, we should certainly expect the appeal to be struck out, although that, of course, would be a matter for the Court as it was constituted at that time. The application is adjourned sine die accordingly.

The appeal is set down for hearing at 9.30 a.m. on Tuesday 2 August 1994. In the meantime the Appellants are to file and serve skeleton arguments on or before 14 June 1994 and the Respondent is to file and serve a reply thereto on or before 30 June 1994.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr Justice Savage
Judge of Appeal

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