IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0030 OF 1994 IN CHAMBERS
(High Court Civil Action No. 1173/84

BETWEEN

SURESH SUSHIL CHANDRA CHARAN
ANURADHA CHARAN APPELLANTS

-and-

SUVA CITY COUNCIL RESPONDENT

BEFORE THE HON. JUDGE OF APPEAL
HON. MR. JUSTICE IAN R THOMPSON
MONDAY 24TH DAY OF OCTOBER 1994 AT 10.00AM

Mr Suresh S.C. Charan for the Appellants
Ms T. Jayatilleke for the Respondent

DECISION

In 1984 the applicants commenced proceedings against the respondent in the court which is now the High Court but was then the Supreme Court. There was a great deal of activity in the matter from then onwards. The case was heard in 1987; because of the political situation at the time, the decision delivered was very brief. In 1988 the Court of Appeal allowed in part the applicants' appeal and remitted part of the case to the High Court where it was reheard in September 1989 by Byrne J. In July 1990 he delivered his judgment; he found for the applicants, although not to the full extent of their claim. He concluded the judgment by awarding them costs in the following terms:-

> "Defendant has to pay all reasonable out-of-pocket expenses incurred by the Plaintiffs and in default of agreement these are to by fixed by the Chief Registrar of the Court."

It seems likely that His Lordship intended the word "taxed" to appear instead of the word "fixed", although the formal judgment, as sealed, also contained the word "fixed".

The parties were unable to agree on the quantum of costs; the applicants lodged a bill of costs and sought to have it taxed. However, when the parties came before the Deputy Registrar there was further disagreement, about the meaning of His Lordship's order. The applicants then applied to him for interpretation of it and a ruling on the award of costs. He made an order in the following terms:-

> "It is ordered as follows that :
>
> (1) the out of pocket expenses means any expenses reasonably incurred by a party in presenting his case in a Court; and
>
> (2) the costs in this action are to be taxed on the scale applicable thereto before the scale was amended on 9.8.93."

The applicants sought His Lordship's leave to appeal against that order; it was refused. They now seek the leave of this Court to appeal. There is no right of appeal without leave as the order is as to costs only (Court of Appeal Act (Cap. 12), Section 12(2)(e)). Leave may also be required by reason of section 12(2)(f), that is to say on the ground that the order is an interlocutory order. However, the parties did not address that question and it is not necessary for me to decide it.

The words used in the order awarding costs in 1990 were

those used generally when costs were awarded by the courts in Fiji and England to litigants appearing in person before Order 62 of the High Court Rules was amended in 1988 by the insertion of rule 27, following a similar amendment having been made to Order 62 of the Rules of the Supreme Court of England in 1986 (O.62 r.18).

In London Scottish Benefit Society v Chorley (1884) 13 Q.B.D. 872 the English Court of Appeal held that a solicitor who litigated on his own behalf was entitled to recover the cost of his work in preparing his case for trial; it distinguished his situation from that of a litigant, not a solicitor, appearing in person who was entitled to recover only the amount which he was "out of pocket". In Buckland v Watts [1970] 1 Q.B. 27 at 35 the Court of Appeal per Danckwerts L.J. held that a litigant in person, other than a solicitor, was entitled to recover only his out-of-pocket expenses and not costs in respect of the time he had expended in preparing his case.

In Malloch v Aberdeen Corporation [1973] 1 All E.R 304 the House of Lords allowed the appellant to recover as costs what he had paid to a solicitor for assistance given to him to prepare necessary documents for trial and for instruction of how to present his case himself at the trial. However, the important point to note about that case is that the costs ordered were in respect of moneys actually paid by the appellant for the solicitor's services. The House of Lords held that it had been "reasonably necessary" for him to spend the money "in order to

prepare his written case and to equip himself to appear and argue his case in person."

The expression "out-of-pocket expenses" used by the courts meant money actually spent, or at least expenditure incurred resulting in an obligation to pay some other person . Byrne J. is an experienced judge whose legal experience dates back well before 1988. There can be no doubt, in my view, that, when he awarded the costs in 1990, he used phraseology with which he was very familiar and intended it to mean what it had meant when used by the courts in cases, such as those to which I have referred above, which were decided before Order 62 was amended. The 1993 order essentially restates that meaning.

I have come to the conclusion, therefore, that the applicants would have no reasonable prospect of succeeding with an appeal to this Court in respect of the first limb of the 1993 order, if leave were granted for them to appeal.

So far as the second limb of the 1993 order is concerned, it was the only order which His Lordship could properly have made. The operative order awarding costs was made in 1990 in respect of costs incurred before it was made-and, therefore, more than three years before the scale of costs in force in 1990 was replaced by a new scale. Nothing in the Rules by which that change was brought about in July 1993 gives any indication that it was intended to have any retroactive effect so as to change rights and obligations which had accrued before it was made. The second

limb of the 1993 order is merely declaratory of the legal effect of the 1990 order awarding the costs and is undoubtedly correct. That being so, the applicants would have no reasonable prospect of succeeding with an appeal to this Court in respect of that second limb, if leave were granted for them to appeal.

Among the submissions made to me by the first applicant, who represented also the second applicant, were some which were not appropriate to the application before me but might have been appropriate if the application had been for leave to appeal against the 1990 order awarding the costs. I drew this to the first applicant's attention and asked whether he wished to make such an application. He assured me that he did not.

For the reasons stated above the application is dismissed. The applicants are to pay the respondent's costs of the application, which I fix as $100.00

I.R. Thompson

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Justice of Appeal

27th October, 1994