

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0035 OF 1996S  
(Lautoka High Court Action 101 of 1990)

BETWEEN:

TOTIS INCORPORATED, SPOR (FIJI) LIMITED  
RICHARD EVANSON

Applicants  
(Original Defendants)

and

JOHN LEONARD CLARK  
JOHN LOCKWOOD SELLERS as executors and  
trustees of the Estate of Michael  
Philip Crew, Deceased

Respondents  
(Original Plaintiffs)

*Mr John Upton Q.C. with Mr Peter Knight for the*  
Applicants (Original Defendants)  
*Dr M.S. Sahu Khan for the Respondents*

Date and Place of Hearing: 5 September 1996, Suva  
Delivery of Decision: 12 September 1996

DECISION ON AN APPLICATION FOR LEAVE TO APPEAL  
AND ON A STAY ORDER APPLICATION

This is an application by the Original Defendants (Applicants) for leave to appeal against the Ruling of Sadal J. delivered on 26 August, 1996 whereby he dismissed the Applicants' application for an adjournment of Lautoka High Court Civil Action No. HBC0101 of 1990L).

Ruling of Sadal J.

The details of the application and the reasons for its refusal appear in Sadal J's Ruling which is as follows:-

" This is an application dated 20th August 1996 by the defendants "for an order that the hearing in Auckland, New Zealand, at which the evidence of the Plaintiffs' witnesses who are residents in New Zealand is to be taken scheduled for 2nd September 1996 be adjourned". Affidavits sworn on 19th August 1996 and 22nd August respectively by Peter Ian Knight had been filed in support of this application.

The date for the hearing of plaintiffs' witnesses in New Zealand was fixed on 26th April 1996 by the Deputy Registrar. Mr. Cowey appeared as Counsel for the defendants when the date of hearing was fixed - 2nd September 1996 as the date for hearing. The solicitors for the respective parties were also informed in writing of this date.

After the date of hearing was fixed the arrangements were made with authorities in New Zealand for the Judge to travel from Fiji for this purpose.

The defendants are now seeking an adjournment because they want to appeal against the orders made by this Court on 20th January 1995 and 8th September 1995 respectively.

No reason was given for such a long delay. Even after the date of hearing was fixed there was delay on the part of the defendants to do anything. Plaintiffs are strongly opposing this application for adjournment. The plaintiffs have agreed to supply the statements which the defendants have requested by 27th August 1996 and this Court has made an order to this effect. Dr. M S Sahu Khan, Counsel for the plaintiffs, stated that the case in New Zealand could start even a week later. The Court was informed that the Counsel representing the defendants will not be available on 2nd September.

An order was made on 18th June 1993 dispensing with the pre-trial conference. The defendants were represented by Mr. Babu Singh of counsel. The defendants did not raise any objection for the dispensation. Now when the date of hearing has been fixed they are saying it is necessary for pre-trial conference.

In view of objection for adjournment by the plaintiffs and unexplained reason for such a long delay I am not prepared to grant the adjournment as sought by the defendants. Mr. Knight suggested an adjournment of 6 months.

However, in the circumstances I grant the adjournment until 9th September 1996 for the taking of evidence of plaintiffs' witnesses in New Zealand.

The defendants are to pay the costs which is to be taxed in default of any agreement."

The Applicants were aggrieved by Sadal J.'s Ruling but since the Ruling constituted an interlocutory decision it was necessary for them to seek leave to appeal. This they did on 29 August, 1996 but Sadal J. refused the application. So on 3 September, 1996 they filed a motion in this Court seeking leave from a single judge, by virtue of his concurrent jurisdiction, to appeal against Sadal J.'s Ruling. They also asked for a Stay Order pending determination of the intended appeal. The application was supported by an affidavit deposed to by Mr Peter Knight.

The Original Plaintiffs in these proceedings are the executors and trustees of the Estate of one Michael Philip Crew (the Deceased) and the Original Defendants are the present Applicants before me.

Mr John Upton Q.C. is Counsel for the Defendants. He lives in Wellington, New Zealand. Messrs Cromptons of Suva act as solicitors for the Defendants. Mr Peter Knight is a Principal of Cromptons. Messrs Sahu Khan and Sahu Khan are on record as solicitors for the Plaintiffs having been instructed by the Auckland solicitors Messrs Howard Smith & Co. Mr Patrick Thomas Finnigan of New Zealand is senior Counsel for the Plaintiffs.

Chronology

It is essential to give a chronological background to the making of the present application.

It is as follows:

- 25 April 1987 - The deceased, a barrister & solicitor, suffered injuries at Turtle Island whilst staying there as guest, resulting in quadraplegia.
- 22 August 1988 - The deceased committed suicide.
- 3 April 1990 - Writ alleging negligence etc filed in Lautoka High Court by Plaintiffs claiming over \$3 million dollars as damages.
- 22 November 1990 - Defence filed.
- 19 May 1993 - Amended statement of claim filed.
- 18 June 1993 - Order dispensing with pre-trial conference made.
- 22 June 1993 - Defence to amended statement of claim filed.
- 22 June 1993 - Application by first and third Defendants that claim be struck out on the ground that no reasonable cause of action disclosed filed.
- 23 December 1993 - Plaintiffs' application for evidence to be taken in N.Z. filed.
- 16 September 1994 - Strike out application heard before Sadal J at Lautoka. Also application for evidence to be taken in N.Z.
- 20 January 1995 - Application for strike out dismissed.

- 22 February 1995 - Application for leave to appeal to strike out decision of 20 January 1995 heard, together with applications by both Defendants and Plaintiffs for interrogatories against each other, and an application by Plaintiffs under Order 39 Rule 1 for evidence to be taken in New Zealand. Decision reserved.
- 22 June 1995 - Leave to appeal against strike out decision granted to 1st Defendant, security for costs fixed at \$350.00 and Order made to file necessary documents within 14 days. [Note: No evidence that Defendants were notified to attend.]
- 24 June 1995 - Above Order sealed.
- 8 September 1995 - Ruling given by High Court - leave granted to both parties to serve interrogatories, application by Defendants for leave to appeal against strike out Ruling of 20 January 1995 recorded as "already been dealt with" (but not to Defendants' knowledge). Order made that evidence of New Zealand witnesses be taken in Auckland.
- 27 October 1995 - Mr Peter Knight advised by telephone from High Court Registry that Ruling on various outstanding matters had been given on 8 September 1995. That was the first advice that he had received on the Ruling.
- 26 January 1996 - Formal Order sealed (on basis of Ruling of 8 September 1995) and served on Defendants' Fiji solicitors. (See Annexure 'F' to Permally's affidavit sworn on 20 August 1996.)
- Continuing discussions and correspondence by Cromptons with Plaintiffs' Fiji solicitors as to Ruling of 8 September 1995 over period from November 1995 through to April 1996.

- 26 April 1996 - Deputy Registrar Lautoka fixes 2 September 1996 as date for the commencement of hearing evidence in Auckland. Both sides represented by Counsel. Fax also sent to solicitors of both sides in Fiji.
- 30 May 1996 - Application filed seeking leave to appeal out of time against Sadal J's Ruling of 8 September 1995 as to taking of evidence in New Zealand.
- 7 June 1996 - Search of High Court file by Cromptons reveals handwritten note by Sadal J that on 22 February 1995 leave to appeal was granted, security for costs was fixed at \$350 and that the necessary documents were to be filed within 14 days. (Defendants contend that no notification of that Order had ever been given to Cromptons. By this stage, the time allowed to appeal had long since expired.)
- 7 June 1996 - Application for leave to appeal against Order as to taking evidence in New Zealand refused by Sadal J.
- 24 June 1996 - Above Order sealed.
- 24 June 1996 - Order granting leave to appeal against Order of 22 February 1995 sealed.
- 19 July 1996 - Defendants file Notice of Appeal against Sadal J's decision of 20 January 1995 refusing strike out application (see Court file in Civil Appeal No. 30/96.)
- 9 August 1996 - Application to Sadal J for adjournment filed.
- 15 August 1996 - Application filed with Court of Appeal for leave to appeal against Ruling of Sadal J delivered by him on 7 June 1996 as to taking of evidence in Auckland.
- 20 August 1996 - (i) Application for adjournment of trial fixed for 2.9.96 filed.  
(ii) Plaintiffs supply Statement of Evidence of 3 expert witnesses to Defendants.

- 22 August 1996 - Respondents file application in Lautoka High Court (a) for necessary Orders under Rule 25(8)(3) of the High Court Rules and (b) for an Order that the Action do continue for hearing from 2 September 1996.
  
- 22 August 1996 - Application to Court of Appeal for leave to appeal Sadal J's decision of 8 September 1995 and sealed on 26 January 1996 part heard in chambers, Court advised of adjourned application in Lautoka High Court coming up for hearing next day. Adjourned sine die with liberty to restore on short notice by letter.  
  
Plaintiffs' solicitors advised Court that they would do what they could to provide statements and names of witnesses by next week ie. the week commencing 26 August 1996).
  
- 23 August 1996 - Application to Sadal J for adjournment of the date of hearing of evidence in Auckland heard. Order made to supply statements by 27 August 1996.
  
- 26 August 1996 - Above application for adjournment refused (see Ruling quoted on p.2 of this decision.)
  
- 27 August 1996 - Plaintiffs supply to Defendants the names of 37 witnesses together with outlines of their evidence.
  
- 29 August 1996 - Application for leave to appeal against above Order refused by Sadal J.
  
- 30 August 1996 - Application to Court of Appeal filed for leave to appeal against Ruling of Sadal J of 26.8.96 and also for a Stay Order.
  
- 5 September 1996 - Hearing of above application takes place in chambers before a single judge.

Applicants' Case

The basic reasons for the Applicants seeking leave to appeal against Sadal J's Ruling are stated to be twofold -

First is the reality of the situation; the time allowed to Applicants' Counsel Mr Upton to consult Respondents' expert witnesses was inadequate and that if hearing of evidence were to commence on 9 September 1996 Mr Upton would find himself in an impossible situation.

Secondly, that it was basically unjust and unfair to start the hearing of evidence on 9/9/96 having regard to the fact that 37 of the 40 statements of prospective witnesses were only tendered on 27 August 1996.

Counsel for Applicants also contended that there are two "appeals" pending in the Court of Appeal and that it is not proper for the High Court trial to commence when appeals filed against interlocutory orders are pending. In this regard paragraphs 5 and 6 of Mr Peter Knight's supporting affidavit sworn on 30/8/96 and filed on 2/9/96 read as follows:

- "5. If the Appellants' appeal, as referred to in paragraph 3 above, is successful, the number of witnesses who are resident in New Zealand and who may need to be called, may be affected.
- 6. If the application for leave to appeal referred to in paragraph 4 above is successful, a notice of appeal against the Ruling of 8th September 1995 will immediately be filed. If the appeal is successful, the evidence of the witnesses which is taken in New Zealand will be nullified and enormous cost will be incurred to no or little effect."

Mr Upton also contended that in terms of Order 25 R.8, experts' reports ought to have been made available within 10 weeks from 2/11/90. Paragraphs 8 and 9 of Mr Knight's affidavit in so far as alleged non-compliance with Rules are concerned, read as follows:

- "8. *The Respondents have not complied with the provisions of Order 25 Rule 8(1)(b) of the High Court Rules in that it is understood that a number of the witnesses that they intend should give evidence in New Zealand are expert witnesses and that the substance of the evidence of those witnesses in the form of written reports have not been supplied to the Appellants, save that the statements of three expert witnesses have been received and save that on 27th August 1996 there was delivered to our firm a list naming 37 witnesses who the Respondents wish to call to give evidence in Auckland, together with an outline of the evidence that it is proposed they will give. It appears that a number of these witnesses would be classified as expert witnesses.*
- 9. *The Respondents have not complied with the provisions of Order 25 Rule 8(1)(d) of the High Court Rules in that they have not provided the Appellants with any photographs, sketch plans or the contents of any police accident report book which they intend to adduce in evidence."*

Respondents' Objections

Dr Sahu Khan has strongly opposed the present application. He also referred to the various affidavits filed in the proceedings before a single judge in this Court. He emphasised -

- (a) That no objection was taken to making of the Order that evidence be taken in Auckland and to the fixing of the commencing date as 2 September 1996.

- (b) That arrangements have already been made for evidence to be taken for six weeks from 2 September 1996.
- (c) That all names and substance of evidence of proposed witnesses have been supplied to Applicants, in terms of Court Order made on 23 August 1996 and that no objection was taken to the nature of the Order and the time fixed by the Court, i.e. 27 August 1996 for supplying them.
- (d) That Civil Appeal No.30/96 is a nullity as it was filed out of time and was in fact filed in breach of terms imposed for granting of leave.
- (e) Inordinate delay in seeking leave to appeal against Sadal J's Order of 8 September 1995 sealed on 26 January 1996.
- (f) There is no appeal against Order dispensing with the pre-trial conference.
- (g) Substantive rights of Applicants not affected.
- (h) No application made to the Court below in the first instance in terms of Rule 26 of the Court of Appeal Rules.

- (i) As all arrangements have been made and as the hearing of evidence cannot now take place before 11 September 1996 the Applicants have had sufficient time to prepare.
- (j) That it will be embarrassing and costly to Respondents if stay were granted.
- (k) Applicants are trying to raise matters in Appeal Court which they did not raise in the Court below.
- (l) As the present application is against an interlocutory order involving exercise of a judge's discretion this Court ought not to grant leave. No serious question of law involved.

#### Court's Views and Comments

Although the application I am dealing with concerns Sadal J's Ruling of 26 August 1996 nevertheless that application has to be viewed in the whole context in which it has been made. I am also mindful that I am not sitting here in an appellate capacity to adjudicate on the actual merits of the proposed appeal but to consider whether leave ought to be granted and a Stay Order made in fairness to the Applicants. However, among the factors I am entitled to take into account are -

- (a) The nature of intended appeal. (This is disclosed in the annexure appended to Mr Knight's affidavit of 30 August 1996.
- (b) The prospects of its success.

I note at the outset the following facts -

- (1) That the Order dispensing with pre-trial conference was made on 18 June 1993 and this has never been a subject of an appeal or an intended appeal.
- (2) There is nothing to show before me that objection was taken before Sadal J to the application that evidence of New Zealand witnesses be taken in Auckland. Even if some objection was made, Applicants came to know on 27.10.95 that an Order to that effect had been made on 8 September 1995. The sealed Order was served on the Applicants' solicitors on 26 January 1996. No steps were taken to challenge this Order in Court until the lapse of several months when an application was filed in the Court of Appeal on 30 May 1996.
- (3) That on 26 April 1996 the Deputy Registrar Lautoka fixed the commencement date for hearing of evidence

in Auckland as 2 September 1996. No steps were taken by the Applicants to challenge the Deputy Registrar's decision. It is noteworthy that both sides were represented by Counsel before the Deputy Registrar.

(4) On 20 August 1996 Respondents supplied to Applicants names of 3 of their expert witnesses together with outlines of their evidence.

(5) The Orders made by Sadal J on 23 August 1996 pursuant to Order 25 R.(8)(3) were made without any objection from Applicants' Counsel.

The Applicants' initial complaint about the failure on the part of the Respondents to supply the names of their witnesses and an outline of their evidence in proper time or at least within a reasonable time had validity. However, this defect or failure has been cured or rectified (at least substantially so) by the Lautoka High Court's Orders made without opposition on 23.8.96 and complied with by the Respondents by delivering the material by 27 August 1996. As regards the contention that the Respondents have failed to comply with Order 25 Rule 3(1)(d) of the High Court Rules there appears to be validity in Dr Sahu Khan's argument that it is not mandatory to provide photographs, sketch plans etc in advance.

As for the contention about pending "appeals" I will deal with Appeal No. 30 of 1996 first. It is clear that it was filed out of time (see Rule 16 and 27 of the Court of Appeal Rules.) Even if the 14 days granted by Sadal J for filing of all necessary documents were on a most favourable interpretation to run from the date of sealing of his Order on 24 June 1996, the Applicants were still out of time. The Notice of Appeal was not filed until 19 July 1996.

In the particular circumstances of this case I do not agree with Dr Sahu Khan that the Notice of Appeal is a nullity. However, in my view the Registrar is now entitled not to process the appeal any further until proper steps are taken to rectify the situation by seeking and obtaining leave to appeal and leave to appeal out of time. The leave to appeal granted by Sadal J cannot be construed as leave to appeal out of time, certainly not ad infinitum. For all practical purposes there is currently no appeal pending before the Court of Appeal. The Applicants have not taken any steps to rectify the situation even though they acknowledge that they were aware that they were well out of time.

As regards the part-heard application before me there can be no appeal pending unless and until leave to appeal, and leave to appeal out of time are granted. The Applicants were granted the liberty to restore the matter for hearing at short notice by letter. They have chosen so far not to avail

themselves of that liberty. Indeed they chose to file and pursue the present application before me.

In my view the Applicants cannot use the so-called pending appeals as a proper ground to support their application for leave to appeal and for a Stay Order.

There is merit in Dr Sahu Khan's submission that an Appeal Court would not normally allow matters not raised in the Court below to be raised on appeal.

Furthermore it is now well established that an appellate Court would not interfere with the lower Court's discretion if that discretion has been judicially exercised upon proper principles. There is nothing before me to indicate that the lower Court has breached that principle.

I now turn to the fact that leave is sought in respect of an interlocutory decision namely refusal to adjourn the date for hearing of evidence abroad. In fact the date was shifted from 2 September 1996 to 9 September 1996 and the interim stay I granted has provided further time to the Applicants to consult their expert witnesses.

It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. It is for this reason that leave to appeal against

such Orders is usually required (see Section 12(2)(f) of the Court of Appeal Act Cap. 12).

Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed.

The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.

Conclusion

In my view there are no exceptional circumstances in the present case. The real issue is whether the Applicants will suffer injustice if a longer adjournment were not granted by the Court of Appeal assuming leave were granted. Sadal J's Ruling is not determinative of the Applicants' substantive rights. Nor does it adversely affect their legal rights. There is no serious question of law requiring determination by the Court of Appeal.

The passage of time has had the effect of effectively vacating the two previous fixtures. In fact logistics would demand that the Lautoka High Court should now fix a new date for the commencement of the hearing of evidence in Auckland. This process would give further time to the Applicants.

Furthermore it is open to Applicants to make any application or submission to the High Court sitting in Auckland if Applicants find themselves in difficulty by reason of their inability to consult any particular expert of theirs. Similarly they could seek a ruling whether any particular report should be submitted to them in advance.

All in all I am satisfied that the Applicants will not suffer any injustice if this application for leave to appeal and Stay Order are refused. If anything it is the Respondents who are likely to suffer prejudice if leave is granted bearing in mind the history of this litigation and the fact that the next sitting of the Court of Appeal will not take place until November this year. In my opinion the proposed appeal is destined to fail if leave were granted.

#### Orders

As a case has not been made out for granting the application I make the following Orders:

- ( i ) Leave to appeal refused.
- ( ii ) Stay application refused.
- (iii) Each party to bear its own costs in respect of the present application before me.

  
Sir Moti Tikaram  
President, Fiji Court of Appeal

Suva  
12 September 1996