

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0060 OF 1995S

(On an appeal from a Ruling given by the High Court Judge at Suva in Civil Action No. 341 of 1993 on an Application for Summary Judgment)

BETWEEN:

AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED

Applicant/Appellant
(Original Plaintiff)

and

DAVID MCINTYRE CAMPBELL

Respondent
(Original Defendant)

Mr S. Parshotam for the Applicant
Respondent in Person

DECISION

(Chamber application for leave to appeal from an interlocutory order and for extension of time within which to appeal)

On 16 June 1993 the Applicant (Plaintiff) issued a writ of summons against the Respondent (Defendant) in the Suva High Court claiming monies against him as a guarantor.

On 1 September 1993 the Respondent filed a Statement of Defence. (Note: Reference to further pleadings as to Amended Statement of Claim etc omitted from this chronology)

On 14 June 1995 the Applicant filed Summons for Summary Judgment under Order 14 Rule 1 of the High Court Rules 1988.

On 22 September 1995 Scott J. dismissed the Summons for Summary Judgment and gave the Respondent unconditional leave to defend.

On 13 October 1995 the Applicant sealed a formal Order as to the dismissal of the Application but without including the Order giving Respondent unconditional leave to defend.

On 13 October 1995 the Applicant filed a Notice and Grounds of Appeal in the Fiji Court of Appeal.

On 14 November 1995 security for costs was fixed. Due to an oversight on the part of the Registry the file lay dormant for sometime after security for costs was fixed.

On 15 January 1996 the FCA Registry submitted the High Court file to the Chamber Judge's PA so that the notes may be transcribed. It was then that Scott J. wrote a minute to the Chief Registrar as follows:

“—On 22 September I dismissed the application for summary Judgment and gave unconditional leave to defend. That latter Order was interlocutory and therefore the Plaintiff needs the leave of the Court to appeal. Please advise Parshotam's accordingly.”

In the meantime Parshotams enquired about their client's appeal and they were informed about the Chamber Judge's view by actually supplying to them a copy of his memorandum.

On 5 March 1997 the Applicant filed summons for leave to appeal and if granted then for an extension of time within which to file the appeal.

The Applicant experienced some difficulty in serving the summons. However, the summons came before me on 26 of March 1997 for hearing.

I made orders requiring both parties to file and serve written submissions by specified dates. Both Counsel agreed that a decision be given on the basis of written submissions without oral hearing unless Court orders otherwise.

As the file will show both parties failed to comply with the orders. However, there was further delay. Finally Counsel for Applicant filed his submissions on 24 April 1997. Mr. S. Matawalu, Counsel for Respondent on record, did not file submissions in reply. When an explanation was sought he informed the Court that he was no longer acting for the Respondent who in fact filed submissions in person on 12 August 1997. Again through an oversight, the Registry did not submit the file for my attention until Friday 19 September 1997.

The provisions relating to appeal

The instance or instances in which an aggrieved party in a civil case may appeal, may not appeal or may appeal only with leave, to the Court of Appeal from a decision or order of the High Court (or a judge thereof in chambers) are set out in Section 12 of the Court of Appeal Act.

The provisions of Section 12 insofar as relevant to the present proceedings are as follows -

“ 12.-(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal-

- (a) from any decision of the High Court sitting in first instance, including any decision of a judge in chambers;*
- (b) -----*
- (c) -----*
- (2) No appeal shall lie-*
 - (a) -----*
 - (b) from an order of a judge giving unconditional leave to defend an action;*
 - (c) -----*
 - (d) -----*
 - (e) -----*
 - (f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court, except*

in the following cases, namely:-

- (i) -----
- (ii) -----
- (iii) -----
- (iv) -----
- (v) -----

(3) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section.

(Substituted by 37 of 1965, s.9.)"

Applicant's contention

It is the Applicant's contention that if an application for Summary Judgment is dismissed by the High Court an absolute right of appeal lies pursuant to Section 12(1)(a) of the Court of Appeal Act. For this submission Mr Parshotam, Counsel for Applicant, relies essentially on the Court of Appeal's judgment in Maganlal Brothers Limited v L.B. Narayan & Company Civil Appeal No. 31 of 1984.

Alternatively he submits that the position that a dismissal of an application for Summary Judgment under the provisions of Order 14 is not tantamount to giving a defendant unconditional leave to appeal, was confirmed in Singh Enterprises Limited v Gopal Goundar and Anor., FCA Civil Appeal No. 10 of 1987. He contends that the dismissal is therefore appealable and the only question is whether leave is required or not.

In his written submissions Mr Subhas Parshotam says as follows -

"In the case of a Defendant being given unconditional leave to defend (say in the case of setting aside a default judgment), the Plaintiff has no right of appeal at all so no issue of leave arises." (2nd paragraph p.4)

That is precisely the position here except that this is not a case involving a default judgment.

Section 12(2)(b) of the Court of Appeal Act provides that no appeal shall lie "from an order of a judge giving unconditional leave to defend an action."

The nature of decision or order made in the Court below

On a hearing of a Summons under Order 14, several courses are open to a judge. He may -

- (a) dismiss the Plaintiff's application; or
- (b) give judgment for the Plaintiff; or
- (c) give the Defendant leave to defend the Action either
 - (i) unconditionally, or
 - (ii) on terms.

I have examined Scott J.'s typewritten judgment dated 22 September 1995 and also the relevant High Court file.

Although the order giving unconditional leave to defend does not appear in the written reserved judgment published on 22 September 1997 in chambers in the presence of both Counsel, it is clear from the judge's handwritten notes on the headsheet that in dismissing the application he also gave Respondent an "unconditional leave to defend."

This I am sure the learned judge did to comply with the Court of Appeal's view that a decision on an application for Summary Judgment under RHC O.14 should clearly express intended future course of the Action - see Dhiraj Lal Hemraj & Anor. v Vinod Kumar Ramanlal Patel, FCA Civil Appeal No. 19 of 1993.

The fact that reference to the giving of unconditional leave to defend is not recited in the formal Order is clearly an oversight.

In the present case there is a clear order of the judge giving the Defendant an unconditional leave to defend. There is here no case to argue whether the dismissal was tantamount to giving unconditional leave to defend or not. The judge's order is explicit. In my view it is part and parcel of the judge's decision to dismiss the application, i.e. it is inextricably linked to it. It is not part of my function to explore whether the learned judge was justified in giving unconditional leave to defend or not. He certainly had jurisdiction to give such leave, he gave it and I must take cognisance of it. (As to a Judge's power to give unconditional leave to defend on an application under Rule 1 see Order 14 r.4(3).)

I am aware that in England since passing of the Supreme Court Act 1981 a Plaintiff can appeal against an order of a judge refusing an application for summary judgment or granting an unconditional leave to defend; but leave to appeal is required. Previously such an appeal was prohibited by J.A. 1925, s31(1)(c) but that provision was not re-enacted in S.C.A. 1981. (See The Supreme Court Practice 1995 (Vol. 1) (59/1/57.) No such statutory change has been made in Fiji.

This Court's initial view

In the circumstances I am of the view that by virtue of Section 12(2)(b) of the Court of Appeal Act the Applicant has no right of appeal at all. Therefore this Court has no jurisdiction to deal with an application for leave to appeal because no appeal lies.

Alternative Approach

But it could be argued that the two orders (i.e. dismissal and granting of unconditional leave to defend) are separable and therefore the application before me for leave to appeal against the dismissal order only should be dealt with on merits.

I notice that the Applicant's Notice and Grounds of Appeal are directed against the dismissal of the Applicant's summons for Summary Judgment. Similarly the leave to appeal application is concerned with the dismissal of the summons. It says nothing about leave to appeal against the order granting "unconditional leave to defend".

In these circumstances it could be argued that the Applicant is entitled to have its leave application dealt with on the basis presented to this Court, i.e. leave to appeal against the "dismissal" simpliciter without dealing with the order granting "unconditional leave to defend".

I can see some merit in this approach if the two orders are held to be separable or that I ought to have ignored the second order. I must therefore first of all consider whether the Applicant has an absolute right of appeal under Section 12(1)(a) as Mr Parshotam has submitted.

It is important to note that Section 12(1)(a) is to be read "subject to the provisions of subsection (2)---"

And subsection (2)(f) says that no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment except in certain circumstances which are not applicable here.

Therefore it is incumbent on this Court to decide first whether the decision of Scott J. dismissing the application is interlocutory or not.

If it is final i.e. not interlocutory, then the Applicant would have, it seems, an absolute right of appeal. But for reasons which will become clear later it is not necessary for me to actually decide this point.

In my view having regard to the nature of application made to the Chamber Judge and the order he made, his decision was an interlocutory one. An order was treated as final only if the entire cause or matter would be finally determined whichever way the Court decided the application.

The nature of the application to the Chamber Judge was such that if he decided it in favour of the Applicant that would have disposed of the Action before the Court subject of course to any appeal.

As it happened the learned judge dismissed the application. Therefore the substantive litigation is still pending and the Action has not been determined. Therefore adopting the 'application' approach I hold that the decision of the High Court judge was an interlocutory one. (See White v Branton [1984] Q.B. 570 followed by the Fiji Court of Appeal in Suresh Sushil Chandra Charan, Anuradha Charan v Syed M. Shah, Suva City Council & Attorney General - Civil Appeal No. 29 of 1994).

Having come to the conclusion that the Chamber Judge's decision was interlocutory I must therefore with respect reject Mr Parshotam's contention that his client has an absolute right of appeal under Section 12(1)(a) of the Act. But the Applicant is entitled to seek leave to appeal from an interlocutory decision, it has made that application and I will now proceed to deal with it on merits.

I have considered the written submissions of Applicant's Counsel set out on pages 4 to 8, as to why leave should be granted. He has referred, inter alia, to the case of Nieman v Electronic Industries Ltd [1978] VR 431 for guidance as to principles applicable.

The Fiji Court of Appeal has emphasised on several occasions that leave to appeal against an interlocutory order will be given only in exceptional circumstances and that an appeal against such an order will rarely succeed unless the order or decision is plainly wrong.

By granting leave the lower Court or a single judge, will be seen to be encouraging appeals. Indeed the purpose why leave is required is to curb such appeals. If an interlocutory order is wrong it can still be corrected on an appeal against the substantive decision of the High Court.

I am mindful that in this case if leave is granted and the Applicant's appeal is successful that would determine the substantive Action. But having read Scott J.'s reason for refusal, the likelihood of the appeal succeeding is, prima facie, minimal. There are no complexities of law in this case which warrant prior determination by the Court of Appeal. In my view it would be to further prolong this old litigation if I were to grant leave. No injustice to the Applicant will result if leave were refused. In my view a proper case has not been made for granting of leave to appeal from the order dismissing the Applicant's application for Summary Judgment. I would therefore in the exercise of my discretion refuse leave. The question of granting extension of time for filing of appeal does not arise.

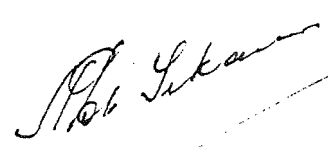
Conclusion

- (i) There is a total prohibition against an appeal from a decision dismissing an application for Summary Judgment if the dismissal is accompanied by an order granting the Defendant (i.e. the Respondent in this case) an unconditional leave to defend (see Section 12(2)(b) of the Court of Appeal Act and RSC 0.14). Therefore the Application fails for want of jurisdiction.

- (ii) If I am in error in regard to (i) above then I hold that in this case the Applicant has no absolute right of appeal under Section 12(1)(a) of the Court of Appeal Act because the dismissal order is an interlocutory one. The Applicant therefore needs leave to appeal.
- (iii) A case has not been made out to justify granting of leave to appeal.

Orders

- (i) Application dismissed.
- (ii) Each party to bear its own costs.



Sir Moti Tikaram
President, Fiji Court of Appeal

Suva
3 October 1997