IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No: ABU0015 of 2001S
(High Court Civil Action No. HBC178/97 & HBC0028/99S)

BETWEEN: HOUSING AUTHORITY
Appellant

AND: PENIONI BULU
Respondent

In Chambers: The Hon. Madam Justice Nazhat Shameem
Hearing: 26th April 2001
Counsel: Mr V. Maharaj for Appellant
Mr. U. Ratuvili for Respondent

Date of Ruling: Friday 27th April 2001

RULING ON LEAVE TO APPEAL
FROM INTERLOCUTORY JUDGMENT

The Appellant has applied for leave to appeal to the Court of Appeal, from the decision of Fatiaki J, refusing leave to consolidate High Court Actions No. 178/97 and HBC28/99, and refusing leave to amend statement of defence in High Court Action No. 178 of 1997. The Application is made under section 12(2)(f) of the Fiji Court of Appeal Act and Rules 25 and 26(3) of the Court of Appeal Rules.

Section 12(2)(f) of the Court of Appeal Act provides that no appeal shall lie from an interlocutory order of the High Court, without the leave of the judge or of the Court of Appeal.

The Respondent in this application is the Defendant in High Court Act No. 178 of 1997. That action is a suit against him as trustee, for money allegedly owed by the trustees of the Talau Housing Scheme to the Housing Authority. In HBC 28 of 1999, the Respondent is the Plaintiff, claiming damages for wrongful dismissal as Manager Lending at the Housing Authority. On a perusal of the pleadings, and having heard counsel, it is apparent that the Housing Authority purported to dismiss the Respondent for authorising irregular advances to the Talau Housing Scheme in his capacity as Manager Lending. The Respondent is being sued for those advances by the Housing Authority as trustee of the Scheme. The Respondent, in his claim, alleges that he was being victimised for his involvement in trade union activities. It is not in dispute that the evidence of the loan account of the Talau Housing Scheme and of the circumstances of the dismissal, would be led in both cases.

On 26th October the Appellant made an application to consolidate both actions on the ground that there were common questions of law and fact. The application was refused. The Appellant made an application to amend its statement of defence by adding a counter-claim. That application was also refused. Although no formal judgment was written, the judge's notes read as follows:

> "Application to consolidate CA 178/97 and CA 28/99 is refused as there are no common questions of law and fact involved nor in my view is it convenient or proper at this very late stage to entertain such an application. As for the oral application to amend the Statement of Defence to include a counter-claim, that is opposed and refused as being very likely to seriously prejudice the plaintiff's present claim. This case will go to trial tomorrow at 10am."

The trial did not proceed because the Respondent was not ready with his witnesses, and because counsel for the Appellant was due to appear in the Court of Appeal. On 8th March 2001 the Appellant applied for leave to appeal. Submissions were heard from both counsel and the application was refused with costs on the same day. No reasons were given for the refusal.

The principles

In The National Insurance Company Ltd. -v- Premier Apparels Civil Appeal No. 14 of 1998, Tikaram P said at p.3:

> "The need for leave to appeal arises because the order or decision which is sought to be appealed is an interlocutory one. It is now well-established that it is only in exceptional circumstances or where a serious question needs to be determined by an appellate court, that leave is normally granted. Appellate courts do not normally interfere with the lower court's exercise of discretion especially with matters of practice and procedure."

Thompson J.A. in Minister for Information -v- Fiji Television Ltd. Civil Appeal No. 24 of 1998, refused leave to appeal saying at p.3:

> ".... it is in the public interest that proceedings in the High Court should not be delayed by the granting of leave to appeal where, even though the appeal may possibly succeed the proper interests of the would-be appellant are unlikely to be seriously affected by the refusal of such leave."

The discretion to grant leave, must therefore be exercised sparingly, and after considering the potential prejudice to both parties.

The proposed grounds of appeal are as follows:

1) That the learned judge erred in refusing an application for consolidation by the Appellant;

2) That the learned judge refused to grant leave to the Appellant to amend its pleadings by amending its statement of defence and to add a counter-claim in breach of Order 20 Rule 5 of the High Court Rules;

3) That the refusal of both applications was an improper exercise of his Lordship's discretion.

An application for consolidation under Order 4 Rule 9 of the High Court Rules may be granted where some common question of law or fact arises in both of them, or the rights to relief claimed are in respect of the same transaction, or it is for some other reason desirable to make an order under the rule.

The main purpose of consolidation is to save time and costs, and should only be ordered "where there is some common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter to render it desirable that the whole should be disposed of at the same time" (Payne -v- British Time Recorder (1921) 2 KB 1, 16/White Book 4/91.

The learned judge found that there were no common questions of fact or law. However, before me, counsel for the Respondent agreed that the same evidence would be led in both actions, and the witnesses would also be the same. In the circumstances, it is certainly arguable that consolidation would save time, not only of the High Court, but also of the parties.

In respect of the counter-claim, his Lordship refused leave to amend because of the prejudice to the Respondent. The record however suggests that neither party was ready for trial in any event, and a new date was to be fixed by the Deputy Registrar.

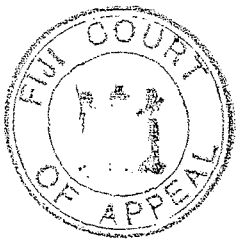
I cannot say therefore that the grounds of appeal are unmeritorious or that they are bound to fail. However, the prospects of the success of the appeal are not the only consideration.

The Respondent says that the appeal will delay the proceedings further, and that he is already prejudiced in the delay thus far. The Appellant says that any prejudice can be sufficiently compensated in damages.

Given the nature of this appeal, if the Appellant succeeds, the proceedings will be considerably shorter than the time spent on two separate cases. If the Appellant does not succeed, the case can be re-listed for hearing which will involve some delay. However, the parties were not ready for trial in November 2000, and the Respondent will be entitled to a costs order if the appeal fails.

Given the undisputed position taken by both parties that the actions 28/99 and 178/97 share common questions of fact, I consider that this is one of those exceptional cases in which leave to appeal ought to be granted.

Leave is granted. Costs are in the cause.



Nazhat Shameem
JUDGE

Solicitors:

Messrs. Messrs. Maharaj Chandra & Associates
Messrs. Fa & Associates

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