

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. Misc 20/2006
(High Court Civil Action No. HBC 262B/2005L)

BETWEEN:

MARIAPPA GOUNDER

(f/n Marda Jalam Gounder)

AND

RAJNESH MUDALIAR

(f/n Mariappa Gounder)

Applicants

AND

KELESI LEWABUA

Respondent

S. Maharaj for the Applicant

A. Sudkar for the Respondent

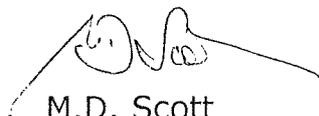
DECISION

[1] This is an application, filed in December 2006, for leave to appeal out of time against two orders made by the High Court at Lautoka on 22 September 2006.

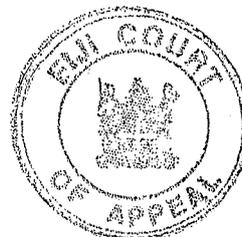
- [2] Assuming the Orders to have been final, then the appeal period expired on 15 November 2006. If the Orders are regarded as interlocutory then the appeal period expired on 25 October 2006.
- [3] The Respondent's husband died as a result of a road accident which occurred on 17 July 2002. The Respondent's case in the High Court is that the cause of the death was the negligent driving of the first Applicant who was at the time employed by the second Applicant.
- [4] Letters of Administration were not granted to the Respondent until 24 November 2003 and, according to her evidence, by the time she was in a position to commence proceedings, the three year limitation period established by Section 4 (1) Proviso (i) of the Limitation Act (Cap. 25 – the Act) had expired.
- [5] On 12 September 2005 the Respondent, pursuant to Section 17 (1) of the Act obtained leave to commence proceedings notwithstanding that the limitation period had expired. In view of the fact that an order granting leave under Section 17 (1) is only provisional (see Re Clark v. Forbes Stuart (Thomas Street) Limited [1964] 2 All ER 282 and generally RSC O.110 – 1967 Edition) the question of whether the Respondent had satisfied the conditions imposed by Section 16 (3) of the Act was adjourned for trial as a preliminary issue. On 22 September 2006 the Respondent's application to strike out the Applicants' defence based on the Limitation Act was granted. An associated application by the Applicants seeking to strike out the Respondent's claim was dismissed.

- [6] The High Court reached two principal conclusions. The first was that the requirements of Section 16 (3) had been satisfied. The second was that, in any event, Letters of Administration not having been granted to the Respondent until 24 November 2003, the three year limitation period did not begin to run until that date and did not expire until 24 November 2006. In these circumstances the claim was not in fact statute barred at all. In support of this second conclusion the High Court relied on dicta on the Privy Council in Chan Kit San v. Ho Fung Hang [1902] AC 257 and SMKR Meyappa Chetty v. S.N.S. Chetty [1916] AC 603.
- [7] In view of the contents of Thomas Nua's affidavit sworn on 9 August 2006 I have some reservations about the first principal conclusion reached by the High Court. As to the second, however, the two authorities relied on by the High Court seem to me to present an insuperable hurdle in the Applicants' path. Although Mr. Maharaj correctly pointed out that the statutes under consideration in the two cases referred to was not the same statute as our own Limitation Act, I find that the considerations relevant to the two decisions of the Privy Council are also relevant to our own statute.
- [8] At the hearing of the application in this Court, the question whether an unreasonable delay in applying for the grant of Letters of Administration might have the effect of abridging the deferred limitation period was briefly discussed. No authorities were however cited in favour of the proposition and neither was the question raised in or considered by the High Court.

[9] In the circumstances I am satisfied that leave to appeal out of time should be refused.



M.D. Scott
Resident Justice of Appeal



20 April 2007.