IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI
LEAVE TO APPEAL TO THE SUPREME COURT

CIVIL APPEAL NO. ABU 0100 OF 2006
(High Court Civil Action No. HBC 447 of 2004)

BETWEEN : MOBIL OIL AUSTRALIA LIMITED

Applicant

AND: LAISA DIGITAKI

Respondent

Coram: Byrne, JA
Hickie, JA

Leave Hearing: Monday, 28 July 2008, Suva

Counsel: S. Parshotam for the Applicant
G. O'Driscoll for the Respondent

Date of Judgment: Wednesday, 30 July, 2008

DECISION

THE APPLICATION FOR LEAVE

[1] This is an Application for Leave to Appeal to the Supreme Court pursuant to Article 122(2)(a) of the Constitution to clarify in relation to the *Civil Evidence Act* 2002 when a party intending to use hearsay evidence has not provided notice of that fact to the other party prior to the hearing (as required by Section 4 of the Act) and how a trial judge should record his or her

assessment as to the weight to be given to such hearsay evidence in accordance with Section 6 of the Act, in particular, as to any inferences which can reasonably be drawn as to the reliability of such hearsay evidence.

[2] Sections 4(1) and (4) of the Act state:

> *"4 (1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings-*
>
> *(a) a notice of that fact; and*
> *(b) on request, the particulars of or relating to the evidence,*
>
> *as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay.*
>
> ...
>
> *(4) A failure to comply with subsection (1) or rules made under subsection (2)(b) does not affect the admissibility of the evidence but may be taken into account by the court-*
>
> *(a) in considering the exercise of its powers with respect to the course of proceedings and costs; and*
> *(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 6."*

[3] Therefore, despite the lack of notice, the evidence is still admissible, however, then Section 6 needs to be considered. It reads:

> *"6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court* ***must*** *have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following-*
>
> *(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;*
> *(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;*

(c) whether the evidence involves multiple hearsay;
(d) whether any person involved had any motive to conceal or misrepresent matters;
(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
(f) *whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."*

[4] The only known judgment to have considered to date section 4 of the *Civil Evidence Act* 2002 is a single judge decision of Justice Winter in ***Wati v. Kumar*** [2004] FJHC 358 (unreported 26 March 2004, High Court of Fiji at Suva, Civil Jurisdiction No. HBC 0214/03) and the current appeal.

[5] ***Wati v. Kumar*** was a judgment where a party had made an application, well before the trial date, pursuant to Order 38 Rule 3 of the High Court Rules, for appropriate orders that an export report be admitted into evidence supported by an affidavit setting out the reasons as to why it would not be reasonable and practical to produce the maker of the original statement as a witness.

[6] By contrast, **the present case was one where no notice had been provided** prior to the hearing as required by Section 4(1) of the *Evidence Act* **and thus considerations pursuant to Section 6 of the Act then had to be taken into account**, that is, as to how this may have adversely affected the weight to be given to the evidence.

[7] As noted at paragraph 64 of our judgment:

> *"Although His Lordship at paragraph 9 of his judgment notes: "... that I must make the assessments as to weight which are required by Section 6", **there appears virtually no assessment in the actual judgment as to the considerations which his Lordship gave in weighing that hearsay evidence**. The only assessment made by His Lordship of that evidence was at paragraph 35 of his judgment wherein **he noted that "having taken regard of the Civil Evidence Act in particular Section 6, I accept those responses"**. In our view, this is an unsatisfactory state of affairs. "*

[8] In our view, the balance which had been provided for by the legislation to counter the abrogation of the rule against hearsay and to provide for a fair trial to both parties is that if a party does not abide by the requirements of Section 4, then Section 6 comes into play.

[9] As the *Evidence Act* of the Fiji Islands is based upon legislation from England and Wales, we referred in our judgment to two cases from that jurisdiction dealing with the legislation to assist in our consideration as to what the legislation required of the Courts.

[10] The first was from the judgment of Baroness Hale who in ***Polanski v Conde Nast Publications Limited*** [2005] UKHK 10 (later reported in [2005] 1 WLR 637 and [2005] 1 All ER 945) concluded at paragraph 80 ([2005] 1 WLR at 655 and [2005] 1 All ER at 963):

> *"The Civil Evidence Act 1995 and the Civil Procedure Rules 1998 are part of a new approach to civil litigation in this country. The court is in charge of how the dispute which the parties have put before it is to be decided ...* ***The court is to be trusted to evaluate the weight of the relevant evidence for itself ....***"

[11] The second, was ***R v Marylebone Magistrates Court; exparte Andrew Clingham*** (No.CO/4441/2000, 11 January 2001, Schiemann LJ and Poole J) [2001] WL 14903, where the Queen's Bench Division (Admin Court), had to consider "an appeal by way of case stated" as to what weight the Court would attribute to hearsay evidence as outlined in section 4 of the Act (**which is the same as section 6 of our *Civil Evidence Act* 2002**). As Lord Justice Schiemann noted at paragraph 17:

> *"The most obvious effect of a recognition that the evidence in question is hearsay evidence is that,* ***in considering what weight to give to the evidence, s.4 of the Civil Evidence Act will need to be borne in mind."***

And then at paragraph 19:

> *"The evidence can be admitted. If its weight is slight or it is not probative the judge can say so.* ***If he comes to an unlawful conclusion his decision can be appealed."***

[12] As we stated in our judgment, this is why the Appellant succeeded before us in the Court of Appeal. Whilst the hearsay evidence from a third party of conversations he had with the maker (at least three years after the events in question and some three years before trial) may have had some probative weight, unfortunately, His Lordship did not provide in his judgment any details as to the relevant considerations he undertook (in particular, the criteria as set out in section 6) "from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence".

[13] In our view, the rule against hearsay has been abrogated in civil proceedings in the Fiji Islands so that evidence is admissible **even if notice requirements are not complied with but then the legislation has given the task to the trial judge to attribute appropriate weight to the evidence** by taking relevant considerations into account (compared with other jurisdictions such as Australia and Hong Kong where such evidence can be excluded or severely restricted if the interests of justice so require.) This has meant that the task allocated to the trial judge in Fiji by Section 6 of the Act "in estimating any weight to be given to hearsay evidence", is crucial to the fair operating of the Act (as the evidence cannot be excluded). Thus, the proper evaluation of that task is essential if there is to be a fair trial for both parties to an action.

[14] Although we are of the view that the judgment by the Court of the Appeal in the present case extensively deals with this issue, the Affidavit and written submissions of Mr SUBHAS PARSHOTAM (a senior practitioner) together with Mr SATISH RATILAL PARSHOTAM's brief enunciation of them at the hearing of the Application for Leave have persuaded us that uncertainty persists.

[15] In such circumstances, as we envisage it may be sometime yet before Civil Procedure Rules are developed in this country, this appeal will provide guidance to both practitioners as well as judicial officers as to how the legislation should be applied.

THE QUESTION

[16] The question we certify to be of significant public importance is as follows:

> ***"WHETHER on the proper construction of Section 6 of the Civil Evidence Act 2002, the Trial Judge must record all considerations relevant to weighing of hearsay evidence or whether it is sufficient for the Trial judge to have the considerations in mind when assessing the weight that should be given to the evidence but to state what those considerations were."***

[17] On the question, we do note that our judgment **did not say** that the Trial Judge must record all considerations relevant to weighing of hearsay evidence. Rather, in our judgment at paragraph 14, we noted:

> *"**The Appellant** points to His Lordship's judgment (as well as the later prepared "Certified - True Record") **and notes that nowhere in either document is it clearly evident that the Trial Judge has done** (which he said he had done in paragraph 35 of his judgment), that is, **"taken regard of the Civil Evidence Act and in particular section 6"** so as to be in a position to "accept those responses" of Mr Singh via Mr Chand's hearsay evidence. These aspects of His Lordship's judgment form the major thrust of the Appellant's appeal."*

[18] Thus, in our view, a trial judge must record in sufficient detail, that is, make **clearly evident** what assessment he or she has undertaken. As Counsel for the Applicant summarised the issue at the hearing of the Application for Leave as to the differences between Counsel on this issue:

> *"We say one line is sufficient. They say it is not sufficient."*

[19] The Court's response was that a glib one line ***"having taken regard of the Civil Evidence Act in particular Section 6, I accept those responses"*** is insufficient and undermines the balance which the legislation has attempted to achieve in making all hearsay evidence admissible but with possible penalties when parties breach the notice requirements.

[20] In our judgment we also cited a decision on this exact issue decided very recently in Hong Kong – a region not unlike the Fiji Islands visited by many tourists and where it is feasible that witnesses for subsequent civil court proceedings may well be located overseas and thus outside the jurisdiction. In ***Amrol v Rivera*** [2008] HKEC 494 heard on 19 March 2008, the District Court of Hong Kong had to consider the admissibility or otherwise of hearsay evidence from an overseas witness who was unable to attend the hearing. The Plaintiff sought to admit a witness statement as evidence without calling that witness as she had returned to the United States of America and "could not return to Hong Kong because her husband was away and she needed to look after the children". Thus, "the Plaintiff served a hearsay notice upon the Defendant two days before the trial was due to commence" seeking to adduce the witness' statement as hearsay evidence (paragraph 6 of judgment).

[21] The Hong Kong legislation is somewhat different to Fiji in that Section 47 of the *Evidence Ordinance* allows a Court to exclude such evidence. That section is then to be read in conjunction with Section 49 concerning considerations as to the weighing of hearsay evidence. As Deputy Judge Ko in ***Amrol v. Rivera*** noted (at paragraph 14), **the witness statement which the Plaintiff sought to rely upon was prepared some 15 months after the incident allegedly occurred and thus it was not only not contemporaneous but that the Plaintiff had not offered to take the witness' "evidence by**

video-link [from the USA] or apply for an adjournment to enable her to attend".

[22] His Honour then went on to note in paragraphs 15-16 of his judgment:

> *"In my view, there are very pertinent and legitimate questions which the Defendant is entitled to ask Ms. Skellham. The Plaintiff's counsel does not dispute that. He, however, suggests that I can first examine the Defendant's denial and then go on to consider Ms. Skellham's evidence if I have decided to reject the denial. I do not think that is desirable.* ***Both Ms. Skellham and the Defendant are referring to the same conversation. It is not practicable to assess the Defendant's denial without reference to Ms. Skellham's evidence. The Defendant will be prejudiced if she were deprived of an opportunity to cross-examine Ms. Skellham.***
>
> *Given its controversial character, I am satisfied that the exclusion of Ms. Skellham's statement is not prejudicial to the interest of justice. I therefore excluded Ms. Skellham's statement."*

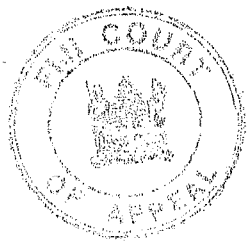
[23] Interestingly, His Honour then went on to note at paragraph 17:

> ***"In any event, I would have given no weight to Ms. Skellham's statement for the reasons stated above even if I had ruled it in."***

[24] In our view, the above is an example of what a trial judge should do in such circumstances. Counsel should be invited to address on the issue either at the appropriate time during the trial but preferably in closing submissions (due to the current nature of trials in Fiji being usually short – with only a day or two allocated – combined with no recording system) as to what weight the trial judge should give to such hearsay evidence and why. The task then undertaken should be clearly evident in the judgment. If we are in error, then we seek the guidance of the Supreme Court on the issue.

[25] ORDERS

1. Leave to Appeal to the Supreme Court is granted on the Question in Paragraph [16] hereof which we certify to be of significant public importance.
2. The Appellant to pay both parties costs of the Application for Leave.



Byrne , JA

Hickie, JA

Solicitors:
Parshotam & Co, Suva, for the Applicant
O'Driscoll & Seruvatu, Suva, for the Respondent