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

CIVIL APPEAL NO. ABU0053 OF 2007S
(High Court Civil Action No. 162 of 2006L)

BETWEEN: LAND TRANSPORT AUTHORITY

Appellant

AND: RAVIND MILAN LAL AND OTHERS

Respondents

Coram: Byrne, JA
Pathik, JA
Lloyd, JA

Hearing: Thursday, 30th October 2008, Suva

Counsel: K. Qoro and F. Kinivuwai for the Appellant
V. Mishra for the Respondent

Date of Judgment: Friday, 7th November 2008, Suva

JUDGMENT OF THE COURT

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[1] The Land Transport Authority ('the LTA'), the appellant in these proceedings, appeals from the judgment of Connors J delivered on 22 June 2007 in the High Court at Lautoka. In his judgment Connors J found for the plaintiffs (the respondents in this appeal) against the 6th defendant, the LTA, in a claim for damages for breach of a statutory duty said to be owed by the LTA to the respondents. The award of damages totalled almost $900,000.00 plus costs.

[2] In appealing the judgment of Connors J the appellant also seeks to appeal several interlocutory judgments and orders made in the proceedings. Counsel for the appellant referred us to the decision of the Supreme Court of Fiji in the case of

Disciplinary Services Commission v Naiveli [2003] FJSC 14. In that case the Supreme Court said that appellate courts such as this Court have the power to revisit the correctness of any interlocutory orders which affect the final result in the trial proceedings or which can be said to be a step in the procedure leading up to the final judgment. This statement of the law is undoubtedly correct but it is for the appellant to convince us of the incorrectness of the interlocutory orders it now seeks to attack.

[3] Before proceeding further and so as to better understand how the interlocutory judgments and orders came to be made it is necessary for us to outline the brief facts of the case and the chronology of the events that have taken place in this case to date. The appeal books reflect that the case has had an unfortunately long and complex history.

The brief facts and chronology of events

[4] On 17 August 1991 the Lal family, consisting of Mr and Mrs Lal and their three children, were travelling in a vehicle on the Queens Road at Tagaqe, Sigatoka when their vehicle came into collision with a vehicle (registered number BX400) driven by the 1st defendant and owned by the 2nd and 3rd defendants. Mrs Lal was killed in the accident. Mr Lal and the three children were all seriously injured. The accident was the fault of the 1st defendant. On 8 August 1994 the surviving members of the Lal family and the estate of Mrs Lal commenced a claim for damages in negligence against the first three defendants. The 1st defendant was later convicted of the criminal offence of dangerous driving causing death for his negligent driving which caused the accident. The three defendants took little part in the civil proceedings and default judgment was entered against them on 30 November 1998.

[5] Apart from the assessment of damages the major focus of the plaintiffs in preparing the matter for trial was to ascertain the identity of the third party insurer of vehicle BX400. The plaintiffs had little hope of recovering any award of damages from any of the first three defendants. The initial proceedings also named three different insurance companies as defendants. It was suspected each might be the third party insurer. Subsequently, two of the insurance companies

were dropped from the proceedings but the action continued against one insurance company named as the 4th defendant. When it became clear that the 4th defendant was not the third party insurer proceedings against it were also dropped. At the time of the plaintiffs' accident the Fiji Government department responsible for ensuring that a licensed vehicle held valid third party insurance was the Transport Control Board.

[6] Given the lack of success in identifying a third party insurer and by order of the High Court on 9 November 2000 the Attorney General was joined as a 5th defendant to the proceedings, the Attorney General representing both the Police and the Transport Control Board, the Government Department responsible for licensing vehicle BX400. The Transport Control Board was not a body corporate and could not be sued in its own name, hence the need to join the Attorney General as the 5th defendant.

[7] Around this time and pursuant to recently promulgated legislation the LTA took over the functions of the Transport Control Board and the record of the High Court reflects that on 9 February 2001 by order of the High Court the 6th defendant, the LTA, was joined as a party to the proceedings. Provisisons of the recently promulgated Land Transport Act enabled the continuation of proceedings commenced under the repealed Traffic Act. The claim against the LTA (as, in part, it had been against the Attorney General) was a claim in negligence and for breach of statutory duty by the LTA's predecessor failing to ensure the owners of vehicle BX400 held a valid third party insurance policy when BX400 was licensed. The joinder of the LTA was not opposed by counsel for the Attorney General and was also with the consent of counsel appearing for the LTA. The plaintiffs were given leave to file an amended statement of claim (pleading their claim against the LTA) which amended claim they filed some weeks later.

[8] The need to join the 5th and 6th defendants came about because the solicitors for the plaintiffs when first preparing the plaintiffs' claim were apparently informed by the police in an Abstract of Particulars of Accident that the 4th defendant was the third party insurer, which information turned out to be incorrect. The LTA

(through its predecessor) had also issued an advice to the plaintiffs suggesting the 4th defendant was the third party insurer. The LTA's advice was also incorrect. The original record card of the predecessor to the LTA, which record card should have disclosed the name of the third party insurer and number of the third party policy had been destroyed.

[9] For reasons that were not adequately explained at the trial, the officer/s at the predecessor of the LTA responsible for doing so, appear never to have sighted a valid third party insurance policy when licensing vehicle BX400. Somehow the officer/s recorded mistaken information as to the identity of the third party insurer, which occurrence caused the plaintiffs to incorrectly name the 4th defendant insurance company as a party to the proceedings in the early stages of those proceedings.

[10] The matter came on for hearing for the assessment of damages before Finnigan J in mid July 2006. By this time proceedings against the 5th defendant had been withdrawn and default judgment had been entered against the 6th defendant, the LTA, it not having filed a defence to the plaintiffs' amended statement of claim anytime over the previous five years since its joinder to the proceedings on 9 February 2001.

[11] On 22 August 2006 Finnigan J delivered his judgment assessing the damages to be awarded against the 1st, 2nd & 3rd defendants but he stated he would deal with the case against the 6th defendant, the LTA, in a supplementary judgment. It was only on 17 July 2006, the first day of the assessment of damages hearing before Finnigan J, that the LTA appeared to actively litigate the matter and raised for the first time a possible defence that it had been joined in the proceedings outside the relevant limitation period. Counsel for the LTA said he had only limited instructions and would argue the limitation issue at the end of the hearing, which he did.

[12] As we understand it, the plaintiffs' claim in negligence and for breach of statutory duty against the LTA was based on the terms of s11(1) of the Traffic Act, which section relevantly provides:

"(1) Application for a motor vehicle licence shall, on the first application for a licence, be made on the prescribed form and, in every case including an application for the renewal of a licence, shall be made to a licensing authority who shall, on payment of the prescribed fee, issue to the applicant a licence.....

Provided that-

(d) the licensing officer shall not issue a licence for a motor vehicle unless he is satisfied that the vehicle is insured against third party risks in accordance with the provision of the Motor Vehicles (Third Party Insurance) Act during the currency of such licence."

[13] The Motor Vehicles (Third Party) Insurance Act provides that no persons shall use or allow a motor vehicle to be used unless there is in place a policy of insurance complying with the provisions of the Act. This Act further provides that that the third party insurer is to indemnify any person entitled to the benefit of a judgment awarded against persons holding a third party policy.

[14] The plaintiffs asserted that given that the vehicle BX400 did not in fact have any third party insurance at the time of the accident, then the staff of the predecessor to the LTA must have been negligent in licensing the vehicle and must have breached their statutory duty in being satisfied that the vehicle had valid third party insurance. It should be noted that the officer/s from the predecessor of the LTA who actually licensed the vehicle in 1991 were not called to give evidence by the LTA at the trial. The plaintiffs asserted in their pleadings that had the staff of the predecessor of the LTA properly performed their statutory duty then the plaintiffs would have recovered from the third party insurer the damages awarded by the trial judge against the driver and owners of the vehicle.

[15] Sometime after delivering his judgment on 22 August 2006, Finnigan J saw counsel for the parties in chambers and gave each of them a copy of his draft supplementary judgment concerning the claim against the LTA , which draft he had foreshadowed delivering in his earlier judgment. Counsel for the plaintiffs was invited by the judge to consider the existing pleadings.

[16] On the 23 October 2006 the plaintiffs filed a summons seeking leave to amend their statement of claim to, in effect, add more specificity to their claim for breach of statutory duty against the 6th defendant, the LTA. The 6th defendant

filed no affidavit in opposition to the plaintiffs' amendment application and, after considering all relevant issues on 26 January 2007 Finnigan J granted leave to the plaintiffs to amend their claim against the LTA. Importantly, Finnigan J found that the proposed amendments caused no prejudice to the LTA and that he had the power to order the amendments sought under the terms of Order 20 of the High Court Rules. The plaintiffs duly filed their amended statement of claim on 12 February 2007. The LTA once more failed to file a defence to the amended claim and default judgment was again entered against the LTA on 22 March 2007.

[17] On 3 April 2007 the LTA filed a motion seeking to set aside the default judgment entered against it on 22 March 2007. After hearing argument on the matter, on 2 May 2007 Connors J ordered that the default judgment be set aside. On 3 May 2007 the LTA for the first time in the matter filed a defence and, inter alia, pleaded that the plaintiffs' claim against the LTA was statute barred.

[18] After hearing the further submissions of the parties, on 22 June 2007 Connors J delivered his final judgment in the matter. In that judgment Connors J found that the 6th defendant, the LTA, owed a statutory duty to the plaintiffs by virtue of the provisions of s11 of the Traffic Act set out by us above, that the LTA had breached that duty and that as a result the LTA was liable to pay the same amount of damages to the plaintiffs that a third party insurer would have been ordered to pay had there been such an insurer. In short, the LTA was to pay to the plaintiffs the amount of damages assessed by Finnigan J on the assessment of damages hearing concerning the quantum of damages to be paid to the plaintiffs by the 1st, 2nd and 3rd defendants.

[19] Connors J did not agree that the plaintiffs claim against the LTA was statute barred. Connors J held that the burden was on the LTA to satisfy itself that a vehicle was properly insured against third party risks (as was conceded by LTA counsel) and on the evidence adduced he was not satisfied that that burden had in fact been met by the LTA. Connors J commented that the LTA had adduced no evidence to suggest that LTA officers were satisfied that vehicle BX400 was insured against third party risks. The only evidence the LTA produced was

shown to be incorrect. Connors J commented that neither the vehicle examiner nor the clerk who effected or renewed the registration (licensing) of the vehicle were called to give evidence nor was their absence at trial explained by the LTA, such that a ***Jones v Dunkell*** ((1959) 101 CLR 298) presumption arose that their evidence would not have assisted the LTA.

[20] It is in light of the above brief summary of the facts of the case and chronology of events that we proceed to consider the appellant's grounds of appeal. We will consider the grounds of appeal in the order in which they are set out in the written submissions of counsel for the appellant.

Ground One; Joinder of the LTA

[21] We have set out above the events relevant to the joinder to the proceedings of the LTA on 9 February 2001 by order of the High Court. There is no doubt that as at the date of joinder of the LTA any cause of action against it at the suit of the plaintiffs was time barred under the Limitation Act. Counsel for the appellant submits that the High Court judge who ordered joinder erred in so ordering and submits that this Court should now review that judge's exercise of discretion to allow joinder. Counsel for the appellant quite properly agreed that the High Court judge had an undoubted discretion to order the joinder of the LTA to the proceedings if *'special or peculiar circumstances'* could be made out by the applicant (see ***Dorney v Sunflower Airlines Ltd*** [1994] FJHC 176 per Pathik J; ***Lynch v Keddell (No. 2)*** (1990) 1 Qd.R. 10 at page 14 ; ***Grother v Maritime Timbers Pty Ltd*** (1991) 2 Qd.R. 128 at pages 132 and 139 and ***Fiji Development Bank v New India Assurance Co. Ltd.*** [2007] FJHC 19).

[22] In making his submission that the judge's exercise of discretion to join the LTA miscarried, counsel for the appellant totally ignores the history of this matter. Firstly, the joinder was not opposed by counsel for the Attorney General, who had been acting for the predecessor of the LTA, which predecessor carried responsibility for fulfilling the duty under s11 of the Traffic Act. Secondly, and more importantly, the joinder of the LTA was ordered with the consent of counsel appearing for the LTA before the judge who ordered joinder. Also, the claim, as pleaded by the plaintiffs shortly after joinder of the Attorney General

was ordered, averred breach of statutory duty on the part of the predecessor to the LTA. No objection was taken to the claim by the LTA when it was joined. Also, the limitation period for any action against the LTA was current at the time the respondents first filed their claim.

[23] Counsel for the respondents submits that in light of the history of the matter, the LTA is now estopped from arguing that the joinder of the LTA outside the limitation period was in any way improper or that the High Court judge's exercise of discretion miscarried. We totally agree. The history of this matter and the conduct of the parties totally justified the joinder of the LTA to the proceedings. It ill behoves the appellant to complain now about its joinder to the proceedings to which joinder it consented at the time. Even if that were not the case, undoubtedly there were *'special or peculiar circumstances'* so as to justify the joinder. The inevitability of the joinder of the LTA being ordered was undoubtedly what motivated the Attorney General to not oppose the joinder. We agree that given the first time the appellant raised any issue concerning joinder or the expiration of a limitation period was at the hearing on the assessment of damages in July 2006 (by which time it still had not filed a defence to the plaintiffs' claim) the appellant is estopped by its prior conduct from raising the matter on appeal.

[24] We would go so far as to say that what took place in this case can be regarded as one of those *'very peculiar circumstances'* (as stated by Lord Esher in ***Weldon v Neal*** (1887) 19 Q.B.D. 394 at page 395) where a court would allow an amendment to a claim which would allow a plaintiff to rely on a cause of action which was statute barred at the time of the application to amend.

[25] As reflected in the judgments of both the High Court judges who presided in the matter, the late joinder of the Attorney General representing the predecessor to the LTA was obviously caused in the first place by the faulty information contained in the records of the predecessor of the LTA.

[26] In the circumstances we are of the view that this ground of appeal is totally lacking in merit.

Ground two; Late amendment of the Plaintiff's claim

[27] The second ground of appeal of the appellant is that the plaintiff did not amend its claim within the time stipulated by the order allowing the joinder of the appellant and the amendment of the statement of claim. The respondents were given three weeks in which to file their amended claim but in fact filed their claim some six weeks after the date of the order. Again, this ground of appeal is totally lacking in merit. This point of late amendment was not taken at trial and, once again, it ill behoves the appellant to take it now. The chronology of these proceedings as outlined by us above reflects tardiness on the part of the appellant at nearly every stage of the proceedings and it is most undignified for counsel for the appellant at this late stage to attack the respondents for delay in fulfilling an order of the High Court made many years ago, which breach caused absolutely no prejudice to the appellant.

[28] In any event this ground of appeal is in reality no ground of appeal at all. It does not assert error in the granting of any interlocutory order. Further, Order 20, rule 8 of the High Court Rules gives the High Court clear power to extend time. Had the High Court judge been asked to do so, he undoubtedly would have extended time.

Grounds three and four; breach of limitation period; prejudice and delay

[29] These grounds of appeal are an extension of the first ground of appeal. We do not repeat here what we said above, but what we said is equally applicable here.

[30] It cannot be doubted that a High Court judge has the discretionary power under the High Court rules to allow the amendment of a claim by the addition of a new cause of action or the addition of a new party to the proceedings at any time (subject to certain qualifications), even where to do so gives rise to a claim being made against a newly added party outside a limitation period fixed by statute (see also s23 of the Limitation Act). But the exercise of the discretion in allowing such amendments must, as always, be exercised in a principled and considered manner.

[31] As stated by Lord Keith in ***Kettemen & Ors v Hansel Properties Ltd & Ors*** [1987] 1 A.C. 189 at 203:

> *"Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well settled principles...the rule is that the amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party..."*

[32] The Fiji Court of Appeal has expressed similar sentiments in the case of ***Ahmed v Ibrahim*** [2002] FJCA 74.

[33] It is to state the obvious that many and diverse factors will bear upon the exercise of the discretion to allow amendments in any particular case. It is neither wise nor possible for us to enumerate them all. Suffice to say, a trial judge is in the best position to determine and weigh up the particular factors affecting his/her exercise of discretion in any particular case.

[34] Apart from allowing the joinder of the appellant to the proceedings, the propriety of which we have dealt with above, in his judgment of 26 January 2007 Finnigan J allowed the amendment of the plaintiff's claim, which amendment merely added greater specificity to the respondents existing claim of breach of statutory duty against the appellant. The same considerations as were relevant to allowing the joinder of the appellant to the proceedings were relevant to the exercise of the discretion to allow the amendment of the claim. One of just many relevant factors was that when the respondents first commenced their claim for breach of statutory duty against the predecessor of the LTA, counsel for the Attorney General made no objection to the claim for breach of statutory duty being brought. Indeed, counsel for the LTA consented to the claim being brought and, indeed, the LTA filed no defence to the claim at that time.

[35] All relevant matters going to the exercise of his discretion were considered by Finnigan J in his judgment of 26 January 2007 and in no way can it be seen that the exercise of his discretion in any way miscarried. He properly considered the relevant authorities stating the principles applicable to an amendment application. On the hearing of the application the LTA filed no affidavit and

adduced no evidence to show it would suffer prejudice as a result of the amendment. Nor could it point to any prejudice at the time of its joinder. In his judgment Finnigan J found as a matter of fact that there was no prejudice to the LTA caused by the amendment of the claim and, by inference, from the joinder of the appellant to the proceedings some years before in 2001. The principles relevant to an appellate court interfering with a finding of fact by a trial judge are well known. It was open to the High Court judge to find as he did and we are not persuaded that we should interfere with his finding.

[36] Even in submissions at the 11th hour in this lengthy litigation the only prejudice that the LTA can point to is that it no longer has full records of what took place within the offices of its predecessor when the vehicle BX400 first came to be licensed and on the renewal of its licence. In our opinion that fact alone is insufficient prejudice for the two judges in the lower court to have refused the plaintiffs' applications for joinder of the LTA to the proceedings and the amendment to the plaintiffs' claim to add greater specificity to the particulars of breach of statutory duty. The reality is that in light of the undisputed fact that the vehicle BX400 had no third party insurance at the material time the staff of the predecessor of the LTA must have been negligent in the performance of their duties. Connor J found as much in his judgment of 22 June 2007 and in his application to the facts of the case of the principle in ***Jones v Dunkel*** ((1959) 101 CLR 298) on this issue.

[37] Given the effect of the various orders and judgments made by the High Court judges who had carriage of the matter from time to time in our opinion it was clearly open to Connors J in his judgment of 22 June 2007 to find as he did in rejecting the appellant's limitation period defence.

[38] We conclude from all the above that the judges in the High Court were quite correct in allowing the joinder of the LTA to the proceedings, in allowing the relevant amendment of the plaintiffs' statement of claim and in rejecting the appellant's limitation period defence.

[39] We see no merit in Grounds three and four as detailed in the submissions of counsel for the appellant.

Ground five; breach of statutory duty and causation

[39] In this ground counsel for the appellant argues that before Connors J could have found for the respondents on the issue of liability, the respondents had to satisfy him that the failure of the LTA in ensuring vehicle BX400 had valid third party insurance before licensing the vehicle *'could fairly and properly be considered a cause of the accident'*. But such a submission shows a complete misunderstanding of how the respondents pleaded their case and misunderstanding of the reasons why Connors J found for the respondents.

[40] The plaintiffs at no time pleaded in their claim and at no time suggested in their submissions that the actions of the predecessor of the LTA caused the accident resulting in the injuries to the plaintiffs. Their case from the time of joinder onwards was always as outlined by us above in our summary of the facts and the chronology. As found (in terms) by Connors J in his judgment of 22 June 2007, the 6th defendant owed the plaintiffs a (statutory) duty of care to ensure that before it licensed vehicle BX400 it should have taken proper steps to ensure the vehicle had attaching to it valid third party insurance. If this duty had been fulfilled then the plaintiffs would have recovered their damages from the third party insurer. By reason of the 6th defendant not fulfilling its statutory duty the respondents lost the opportunity to recover their damages from a third party insurer and thus the appellant (through the staff of its predecessor) directly caused the plaintiffs to lose the opportunity to recover their damages and thus recovery of the damages themselves. In our opinion causation was proved by the respondents, but it was not the cause about which the appellant now complains..

[41] For the reasons stated by us above we find this ground of appeal also has no merit.

Orders

[42] For the above reasons, we order that:

(1) The appeal be dismissed;

(2) The appellant to pay the respondents' costs of the appeal.

Byrne, JA

Pathik, JA

Lloyd, JA

Solicitors:

Qoro Legal, Lautoka for the Appellant
Mishra Prakash and Associates, Lautoka for the Respondent