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IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

MISC ACTION NO. 03 OF 2009S
(Civil Action No. HBC257 of 2007S)

BETWEEN: **HONEYMOON ISLAND [FIJI] LIMITED**
Appellant

AND: **NATIVE LAND TRUST BOARD**
Respondent

In Court: **The Hon Justice Randall Powell, Justice of Appeal**

Hearing: **Wednesday, 1st April 2009, Suva**
Friday, 3rd April 2009, Suva

Counsel: **K. Kumar for the Appellant**
A. Mataitini for the Respondent

Date of Ruling: **Friday, 3rd April 2009, Suva**

RULING

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[1] On 5 October 2007 Honeymoon Island (Fiji) Limited (Honeymoon Island) entered a default judgment against the Native Land Trust Board (the Board). The judgment was for liability for breach of an alleged lease agreement. Damages for the breach remained to be assessed.

[2] On 22 October 2007 the Board filed a Summons to set aside the default judgment and on 25 July 2008 the High Court (Datt J) set it aside.

[3] On 11 August 2008 Honeymoon Island field a Notice of Motion and Grounds of Appeal (the appeal) against the decision of Datt J. On 28 August 2008 the Court of Appeal wrote to the solicitors for Honeymoon Island noting that when the matter

had been called before the Registrar that day there had been no appearance for Honeymoon Island, and that the Court had ordered that security for costs of $2,000 be paid within 28 days and that the records be filed within 28 days or 14 days upon receipt of the Judge's Notes (if any) whichever is the later.

[4] Due to an oversight Honeymoon Island's solicitors neglected to pay the sum of $2,000 ordered by the Court and the proceedings were struck out by the Court. On 25 February 2009 Honeymoon Island filed a Notice of Motion for an order that leave be granted to file a fresh Notice of Motion and Grounds of Appeal. This was served on the NLTB the next day.

[5] There followed on 16 March 2009 a letter from the Registry to Honeymoon Island's solicitors to the effect that the Court was minded to grant this application subject to an undertaking to indemnify the NLTB *"for any loss or damage occasioned by the delay attributable to the solicitors."* The Registry wrote this letter after a judge read the file in his chambers, and prepared a file note in which he said that he was *"minded to grant this application"* on such terms and that this should be communicated to the solicitors for Honeymoon Island.

[6] The solicitors for Honeymoon Island replied to the Registry on the same day (16 March 2009) saying *"We assume that the loss or delay you refer to is in relation to cost because that is the only item associated with the proposed application. If this is so then we agree and may we suggest that the order should read that the proposed Appellant should pay NLTB cost occasioned by the Appellant's application to be taxed if not agreed."*

[7] The file in this matter was last week referred to me and I directed the Registry to have the Notice of Motion returnable in Court with both parties present.

[8] Any correspondence from the Court sent to one party in proceedings should be copied to the other. It is a matter of natural justice. To be fair to the Registry, the Notice of Motion had been referred to the judge with the intention that the judge hear the Notice of Motion. Instead the judge wrote the file note and then departed the jurisdiction and the Registry felt obliged to carry out his written instruction.

[9] The above matters were explained to counsel in open court on 1 April 2009, the place where all Notices of Motion ought to be dealt with. The old practice of hearing some applications in Chambers has no place in 2009 except in exceptional circumstances, for example if no courtroom was available. It is also in breach of section 29(4) of the Constitution and in direct contradiction of a memorandum of the Acting Chief Justice dated May 2008.

[10] This Notice of Motion however has serious problems.

[11] Section 12(2) of the Court of Appeal Act provides that in civil cases *"No appeal shall lie (f) without the leave of the judge or the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court"* except in certain specified cases.

[12] The decision of Datt J, setting aside the default judgment, was an interlocutory one: see ***Vinod Raj Goundar v The Minister for Health*** [2008] ABU0075 of 2006S. In that case the Court of Appeal at paragraph 38 listed examples of interlocutory decision including the refusal of an application to set aside a default judgment. An order setting aside a default judgment is also, obviously, interlocutory, and has always been so.

[13] The Notice of Motion and Grounds of Appeal filed on 11 August 2008 was incompetent. Honeymoon Island did not have leave to appeal.

[14] I expressed the view in Court on 1 April that there were two courses open to Honeymoon Island. It could accept the decision of Datt J and have the proceedings against NLTB made ready for hearing. Or it could file a Notice of Motion seeking leave to appeal the decision of Datt J and seeking leave to make the leave application out of time.

[15] I also expressed the view that the latter course would be ill-advised because such an application is almost certain to fail, not just because it is out of time, but because the Court of Appeal will only give leave to appeal a decision to set aside a default judgment in rare and very clear cases.

[16] At the request of the parties I adjourned for fifteen minutes to allow discussion between the parties. Upon resumption I was informed that the NLTB consented to Honeymoon Island being given leave to appeal the interlocutory order. I explained to counsel that while the consent of the other party was a relevant matter to consider, the applicant would need to satisfy the Court that there were real prospects of the appeal succeeding, a difficult matter when the exercise of a judge's discretion was being challenged.

[17] I then agreed to hear the application for leave to appeal on Friday 3rd April 2009, noting that the applicant would seek to demonstrate that the finding of Datt J in paragraph 30 of the judgment was not available to him. A Notice of Motion seeking leave to appeal was then filed on 2 April returnable on 3rd April 2009.

[18] Paragraph 30 of the judgment reads:

"The particulars contained in the draft notice of grounds of defence disclose that there is a dispute between parties concerning the validity of a lease agreement and occupation of native land, the Mocui Islands, by the Plaintiff."

[19] The proposed draft defence contained a paragraph that said that the alleged agreement was *ambiguous and unclear* and this is what Datt J appears to have

drawn upon in making the finding in paragraph 30. The alleged lease agreement was not in evidence before the trial judge and there was no affidavit before the judge verifying or deposing to the truth of the matters in the proposed defence. Accordingly it appears that his exercise of discretion may have miscarried in accordance with the principles set out in ***House v The King*** [1936] 55 CLR 499.

[20] However it is not enough for an applicant for leave to show that a trial judge's interlocutory decision was in error. It is often in the interests of justice to allow the proceedings below to be finalised before any appeal is allowed, and that is particularly true in this case. In its statement of claim the appellant not only claims the return of moneys paid pursuant to the alleged lease but claims loss of profit for the 99 year term of the lease. If the default judgment is allowed to stand a judge may be obliged to assess substantial damages, and, if there is no valid agreement, then the NLTB would certainly appeal, an appeal court might allow the appeal and refer the matter back to the High Court for hearing. This process could take years and would not be in the interests of the parties or the Courts. It is far better that the issues of liability and damages be determined together and as soon as possible.

[21] The Notices of Motion filed 25 February and 2 April 2009 are dismissed. There will be no order as to costs because the NLTB ought to have taken the point that the appeal was incompetent and moved to strike it out in August 2008.

FIJI COURT OF APPEAL

Randall Powell

Randall Powell
Justice of Appeal

Solicitors:

Young and Associates, Lautoka for the Appellant
The Legal Officer, Native Land Trust Board, Suva for the Respondent