

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL ABU 19 OF 2012
(High Court HBC of 1996 Ltka)

BETWEEN : **LAUTOKA CITY COUNCIL** *Appellant*

AND : **AMBARAM NARSEY PROPERTIES LIMITED**
First Respondent

AND : **MOHAMMED YAKUB KHAN, MOHAMMED NASIR KHAN, MOHAMMED SABIR KHAN, MOHAMMED IQBAL KHAN, MOHAMMED MUKHTAR KHAN AND MOHAMMED AYAD KHAN**
Second Respondents

Coram : **Calanchini P**

Counsel : **Mr R Prakash with Ms S Devi for the Appellant.
Mr C B Young for the First Respondent
Ms N Khan for the Second Respondents**

Date of Hearing : **20 January 2014**

Date of Decision : **5 February 2014**

DECISION

[1] This appeal is listed for hearing before the Court of Appeal on 14 February 2014.

- [2] I have before me two applications seeking orders granting an enlargement of time to file and serve Respondents' Notices. The first application was by summons filed by the First Respondent on 6 December 2013 seeking "*leave to file Respondent's Notice.*" The application was supported by an affidavit sworn on 5 December 2013 by Arun Narsey. (This application will be referred to as the first application).
- [3] The second application was by summons filed on 9 January 2014 by the Second Respondents "*for leave to file 2nd Respondents Notice.*" This application was supported by an affidavit sworn on 8 January 2014 by Mohammed Yakub Khan. (The second application).
- [4] The applications were opposed by the Appellant. An affidavit sworn by Jone Qio Nakauvadra was filed on 27 December 2013 on behalf of the Appellant. The First Respondent opposed the Second Respondents' application. The Second Respondents did not oppose the First Respondent's application.
- [5] Under section 13 of the Court of Appeal Act Cap 12 (the Act) the Court of Appeal, for the purposes of and incidental to the hearing and determination of any civil appeal has all the power, authority and jurisdiction of the High Court. This jurisdiction includes extending or enlarging the time within which a party must file and/or serve a particular document. Under section 20 of the Act, a single judge of the Court may exercise the powers of the Court to extend the time within which any other matter or thing may be done. In **Raj v Sumintra** (unreported ruling in ABU 43 of 1996 delivered 28 January 1998). Tikaram P was clearly of the view that a single judge of the Court has the power to give leave to serve a Respondent's Notice out of time.
- [6] Pursuant to Rule 19 (4) of the Court of Appeal Rules (the Rules) a respondent's notice is required to be served on the appellant and any other party to the proceedings in the Court below who may be directly affected by the contentions of the respondent within 21 days after service of the notice of appeal on the respondent.
- [7] The notices of appeal were served on the Respondents on 19 April 2012. Each Respondent was required to serve the respondent's notice on the Appellant and the other Respondent by 10 May 2012.

- [8] The factors to be considered by a court in an application such as the present, involving as it does the exercise of a discretion, are well settled. (See **NLTB –v- Ahmed Khan and Another** unreported Supreme Court decision CBV 2 of 2013; 15 March 2013). In these applications it is necessary to consider (a) the length of the delay, (b) the reason why the notice was not served within time, (c) whether there is a ground in the notice that not only merits consideration by the Court of Appeal but is a ground that will probably succeed and (d) whether the Appellant will be unfairly prejudiced if time is enlarged.
- [9] However, before considering these factors, it is necessary to determine whether the contentions raised by the Respondents in each of their Notices may properly be raised by way of a notice under Rule 19 of the Rules. Under Rule 19 a respondent’s notice is appropriate to (a) contend on the appeal that the decision of the court below should be varied either in any event or in the event of the appeal being allowed in whole or in part or (b) contend that the decision of the court below should be affirmed on grounds other than those relied on by that court.
- [10] The contentions raised by the First Respondent in the draft Respondent’s Notice that was annexed to the affidavit in support of the application were:

“ _ _ _ that the judgment _ _ _ holding the Appellant and the Second Respondents jointly and severally liable to the First Respondent should be affirmed on the following other grounds, namely:

- (i) That the Appellant and the Second Respondents were concurrent tortfeasors and as such the Appellant and the Second Respondents were each severally liable to the First Respondent for the whole of the judgment sum, interest and costs.*
- (ii) The apportionment of liability between the Appellant and the Second Respondents was made by the learned Judge pursuant to section (6) (1) (c) of the Law Reform (Contributing Negligence and Tortfeasors) Act Cap 30 and the pleading because each of them was seeking contribution against the other tortfeasor but such apportionment did not affect either party’s several liability to the First Respondent for the whole of the judgment sum, interest and costs.”*

[11] The question at this stage is whether the above contentions constitute an affirmation of the judgment on grounds other than those upon which the learned Judge in the Court below relied. In paragraph 130 of his judgment the learned trial Judge concluded:

“There will be judgment for the Plaintiff jointly and severally against each defendant.”

[12] In paragraph 131 the learned Judge stated:

“I apportion the total award to be met by the 1st defendants 80% and the 2nd defendants (the Counsel) 20%.”

[13] Then in paragraph 133 the learned Judge sets out the amount of damages that have been awarded to the First Respondent together with costs and interest. There has been no attempt by the learned Judge to calculate each party’s liability to pay to the First Respondent an amount based on apportioned liability. There is nothing in the judgment to indicate that the learned Judge intended to limit the First Respondent’s entitlement to recover the full judgment amount from either Respondent.

[14] The only aspect of the judgment that may require consideration is the use of the words in paragraph 131 *“I apportion the total award to be met.”* However it seems that what the First Respondent is seeking by way of its proposed Notice is clarification of the legal effects of (1) the finding on liability rendering the Appellant and the Second Respondent jointly and severally liable and (2) the apportionment of liability by the learned Judge on the basis that the Appellant was 20% liable and the Second Respondent 80% liable.

[15] In my view the correct approach and that which the learned trial Judge has followed despite the ambiguity of the wording in paragraph 131 of his judgment is clearly restated by McColl JA in **Stojan (No.9) Pty Ltd –v- Kenway** [2009] NSWCA 364 in paragraphs 163 – 165:

“The primary judge ordered that there be a verdict for the Plaintiff and judgment in the sum of \$336,271.76 with Stojan to pay 80% and the council to pay 20% _ _ _.

However at common law a plaintiff who recovered damages against several concurrent tortfeasors was entitled to several judgments against each for the full amount. Apportionment was a matter between the defendants which did not concern the plaintiff _ _ _

Accordingly the primary judge ought to have entered a verdict and judgment against Stojan and the Council respectively for the full amount of the Plaintiff's damages."

[16] The apportionment of liability as between the Appellant and the Second Respondent was undertaken by the learned Judge pursuant to section 6 of Law Reform (Contributory Negligence and Tortfeasors) Act Cap 30. It was raised as an issue in the pleadings. It could have been raised by notices under Order 16 Rule 8(1) (a) of the High Court Rules.

[17] In my judgment the legal consequences of the findings of (a) joint and several liability for the payment of damages, interest and costs and (b) apportionment of liability as between the Defendants by the learned Judge are well settled and beyond dispute. The First Respondent is entitled to enforce his judgment for the full amount awarded against either the Appellant or the Second Respondent. The First Respondent cannot recover from the parties more than the total amount awarded by the Court. The Appellant and the Second Respondent can seek recovery from each other for payment of the other party's apportioned liability. For example, in the event that the First Respondent enforces its judgment against the Appellant and recovers the full amount awarded from the Appellant, then the Appellant may seek to enforce the judgment against the Second Respondent to recover 80% of the amount the Appellant paid to the First Respondent.

[18] However, this analysis of the contentions clearly indicates that the First Respondent's contentions do not seek to affirm the judgment on different grounds. As a result the First Respondent has not established a proper ground for seeking leave to serve a Respondent's Notice under Rule 19 of the Rules.

[19] The contentions raised by the Second Respondent in its proposed Respondent's Notice are, but for one, no more than grounds of appeal and should have been the subject of a Notice of Appeal under section 12 of the Act. Counsel for the Second

Respondent conceded that the only issue raised in the proposed Notice that was appropriate for the Court's consideration in a Notice under Rule 19 was the contention that the decision that the Second Respondent was 80% liable for the First Respondent's loss and damage should be varied. As such this one contention does fall within Rule 19 of the Rules and is a proper contention for a Respondent's Notice. (See **Shankar –v- Naidu** [2001] 1 FLR 358 at page 360).

[20] The application was filed on 9 January 2014. The Notice of Appeal had been served on the then legal practitioners for the Second Respondent on 19 April 2012. The Notice was required to be served on 10 May 2012 and was as a result some 21 months out of time. The delay is substantial. The reasons for the delay are set out in an affidavit sworn on 31 October 2013 by Mohammed Yakub Khan which was annexed to a later affidavit sworn on 8 January 2014 by the same deponent. There is no explanation in the latter affidavit as to the reasons for the delay between 31 October 2013 and 9 January 2014. I am not satisfied that the reasons for the delay up to 31 October 2013 are sufficient to justify the substantial delay up to 9 January 2014. Furthermore, I am not satisfied that the written submissions filed on behalf of the Second Respondent have established a sufficiently strong case that the apportionment should be varied in to order to justify allowing the Notice to be considered by the Court at this late stage. The Second Respondent's application is dismissed.

[21] I make the following orders:

1. *The applications by the First and Second Respondents for leave to file and serve a Respondent's Notice out of time are dismissed.*
2. *The costs of the applications are to be costs in the appeal.*

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HON. MR JUSTICE W. D. CALANCHINI
PRESIDENT, COURT OF APPEAL

