IN THE COURT OF APPEAL
APPELATE JURISDICTION

CIVIL APPEAL NO. ABU 60 of 2013
(High Court HBC 248 of 2006)

BETWEEN : **LAMI INVESTMENTS LIMITED**

Appellant

AND : **KELTON INVESTMENT LIMITED**

Respondent

Coram : **Calanchini P**
Almeida Guneratne JA
Seneviratne JA

Counsel : **Mr. H. Nagin for the Appellant**
Ms. B. Narayan for the Respondent

Date of Hearing : **5 February 2016**

Date of Judgment : **26 February 2016**

JUDGMENT

Calanchini P

[1] I have read in draft the judgment of Guneratne JA and agree with his conclusions and his reasons.

Almeida Guneratne JA

Introduction

[2] This is an application under Section 12(1)(c) of the Court of Appeal Act (Cap.12), which restricts the right of appeal to a question of law only, against the judgment of the High Court of Fiji dated 21st October, 2013. By that judgment the High Court refused to grant leave to appeal against an order dated 30th December, 2010 of the Master of the High Court of Suva. By his order the Master had disallowed an application to amend the original statement of defence filed by the Appellant (original defendant).

[3] I shall recount here only the facts material for the purpose of determining this application.

[4] The Respondent (original plaintiff) refused to renew a lease of a property given to the Appellant (*interalia*) on the ground that, the Appellant, in breach of the lease agreement, had built a series of mezzanine floors and fixtures in the leased premises. (vide: paragraph 10 of the Statement of Claim, at page 279, Vol.2 of the Record of the High Court (RHC). The said Statement of Claim is dated 8th June, 2006.

[5] In its original Statement of Defence the defendant pleaded that, there are two mezzanine floors in the premises, one constructed by the plaintiff itself and the other by the defendant during the fit out period with the full knowledge and consent of the plaintiff. (vide : paragraph 11 of the original statement of defence, at page 272 of Vol. 2, RHC).

[6] The said statement of defence is dated 30th June, 2006.

[7] Having moved for summons to have the statement of defence amended on 7th March, 2008 (vide: p.221 of Vol.1, RHC) and then again on 28th May, 2008 (p.231, ibid), the defendant finally filed an amended statement of defence on 1st September, 2008. (vide: p.241 of the RHC).

Nature of the Amendment

[8] In the proposed amended statement of defence, the defendant pleaded that, there are two mezzanine floors in the premises and both of them were constructed by the plaintiff itself. The defendant only built a ceiling in the rafters at the rear mezzanine floor during the fit out period with the full knowledge and consent of the plaintiff. (vide: paragraph 11 of the Amended Statement of defence at p.244 of Vol. 1 of the RHC).

Some Initial Reflections

[9] As noted above, while the initial statement of defence was on 30th June, 2006 the proposed amended statements were tendered on 7th March, 2008 and 28th May 2008, and finally on 1st September 2008, that is, after a lapse of two years.

[10] Apart from that aspect of delay which at first blush could be said as to have been a factor that might have weighed against the Appellant, there was also the added factor that, in the affidavit of the Managing Director dated 12th April, 2012 in support of the Motion to have the initial statement of defence amended (vide: pp.24 – 27 of Vol. 1 of the RHC) there was no explanation as to the said delay of almost two years.

[11] It is revealed from the said affidavit that, the sole ground on which the amendment was sought rested fairly and squarely on the premise that, it was a mistake on the Appellant's part when it averred in the initial statement of defence that, it had constructed 'that' second mezzanine floor.

[12] The affidavit does not state as to when the 'mistake' was discovered. It merely states that the said deponent realised the 'mistake' only when the defendant's solicitors pointed it out to him – the solicitors being the same ones who had been representing the defendant for many years as the record reveals.

[13] In the background of the aforesaid initial reflections I shall now proceed to examine first, the basis on which the learned Master refused to allow the amendment sought to be made to the initial statement of defence of the Appellant.

The Learned Master's Order and the Reasons Adduced Therefor

[14] The learned Master's order is at pp.172 – 201 of the RHC (Vol.1).

[15] The criteria adapted by the learned Master in refusing the amendment may be discerned as follows:-

(a) that, the amendment was sought late in the day after the pre-trial conference.

(b) that, it was mala fide for it was an attempt to avoid the main issue.

(c) that, it was to prolong the trial unnecessarily.

(d) that, in earlier judicial proceedings in the High Court and in the Court of Appeal the Appellant had admitted to having built a mezzanine floor.

Pre-Trial Conference cannot bind parties

[16] In so far as [15](a) above is concerned, while it is true that, the battle lines had been drawn, it transpired at the hearing before this Court that, the minutes of the said conference had not been signed by the parties. Indeed, this Court could not find such a signed document. In any event, such pre-trial minutes cannot bind parties to litigation in as much as there is no statutory warrant to hold otherwise.

[17] It is pertinent to note that, the learned Master did not hold against the Appellant on a consideration of "unexplained delay" *per se* in moving to amend after a lapse of two years from the initial statement of defence but that it had been "sought late in the day after the pre-trial conference."

[18] In so far as [15] (b) and (c) are concerned, to my mind, they are interlinked as feeding the aspect of *mala fides* on the part of the Appellant as held by the Master.

What was the main issue?

[19] Was the Appellant attempting to avoid the main issue? What was the main issue? That is, whether the Appellant built a mezzanine floor in breach of the lease agreement as alleged by the Respondent.

[20] Having averred in the initial statement of defence that it constructed a mezzanine floor the Appellant proposed to seek an amendment in averring that, it only constructed a ceiling in the rafters at the rear mezzanine floor.

[21] The matter then reduces itself to a simple case of deciding whether

(a) a distinction could be drawn between building a mezzanine floor and building a ceiling in the rafters at the rear mezzanine floor.

(b) if no distinction could be drawn then there could not result any irreparable prejudice to the plaintiff.

(c) on the other hand if such a distinction could be drawn then that would cause injustice to the Appellant for it would be prevented from putting forward its proper defence.

(d) (a), (b), and (c) thus stood as matters of evidence to be led at the trial.

(e) If the defendant was to fail on the original statement of defence that, the second floor was done with the knowledge and consent of the plaintiff that would have put an end to its defence.

(f) Should the defendant succeed even if it was unable to prove that, the building of a ceiling in the rafters at the rear mezzanine floor was done with the consent and knowledge of the plaintiff, then it could succeed in its defence.

(g) Thus, stood the "real dispute" or the real question of controversy between the parties. (vide: **R. L. Baker Ltd. v. Medway Building & Supplies Limited**) per Jenkins L.J. [1958] 3 All ER 540 at 546.

(h) No doubt, the Defendant (Appellant) in its initial statement of defence had been negligent in failing to appreciate the distinction (if any) between "a mezzanine floor" and "a ceiling in the rafters at the rear of a mezzanine floor."

(i) To my mind, that 'mistake' is precisely what the Appellant was seeking to rectify in the proposed amendment.

(j) Thus, the criterion formulated by Jenkins L.J. (supra) appears to have been satisfied.

[22] Consequently, rather than "trying to avoid the main issue" (as the Master held), by the proposed amendment, the Appellant was seeking to meet the main issue.

[23] In so far as the Appellant's lament that it had made 'a mistake' in failing to appreciate the distinction between "a mezzanine floor" and "a ceiling in the rafters at the rear of the mezzanine floor" is concerned, I am of the view that, that would be a matter of evidence and in cross-examination the Appellant's witnesses credibility could be attacked at the trial.

Was the Appellant seeking to prolong the trial unnecessarily?

[24] There is no doubt that the Appellant had delayed for two years in moving to amend the initial statement of defence. Nevertheless, in the present case not even a trial date

has been assigned. So what prejudice could have been caused to the Respondent? Apart from that, whether it was "a mezzanine floor" or "a ceiling in the rafters at the rear of the mezzanine floor" that is something that continues to exist on the ground.

Irrelevance of the Appellant's Motive to delay the trial

[25] Thus, whether the Appellant's motive was to delay the trial unnecessarily is rendered irrelevant. As Lord Devlin in a celebrated phrase once said "Even the devil knoweth not the mind of man" and the present case defies any motive investigation for the Appellant's simple case in seeking the amendment in question was that, in its initial statement of defence, it had made "a genuine mistake." As reflected earlier by me, whether it was so or not would be a matter that could be tested at the trial.

Delay could have been compensated by an appropriate order for costs

[26] Procrastination no doubt is not only the thief of time but it can also affect litigation. Then there is the adage that "justice delayed is justice denied." On the other hand justice hurried would not be justice at all. As I have said earlier, whether on account of a 'mistake' or not, whether there was no explanation as to when the mistake was discovered or not, the overall consideration ought to be the quest to do justice between the parties, that is, to determine "the real dispute or the real question of controversy between the parties."

The function of the law and the Courts as a means or mechanism to resolve conflicting interests

[27] If the delay of two years was the complaint of the Respondent, the lament on the part of the Appellant was that it would be deprived of its defence to have the real dispute or controversy between it and the Respondent being determined.

[28] Thus, weighing the scales of justice, the Appellant would have stood to lose more. Consequently, the balance to be struck, to my mind, would have been to award

appropriate costs against the Appellant's procrastination to have the initial statement of defence amended.

Re : The principles applicable to the grant or refusal of amendment to pleadings

[29] The several authorities cited by the Appellant certainly stand in its favour. (See among others, **Reddy Construction Company Limited v. Pacific Gas Company Limited;** Court of Appeal, Civil Jurisdiction, 27th June, 1980; **The Duke of Buccleuch** [1892], P.201 at p.211; (**Cobbold v. Greenwithe** [1999] LBC, 9th August (Unrep.); **Reddy Construction Company Ltd. v. Pacific Gas Company** [1980] FLR 121, at p.126; **Hollis v. Burton** [1892] 3 Ch. 226; **Vinod Patel and Company v. Glenn Rick**, Suva, Civil Action No. HBC 106 of 2008 and; **Peter Sujendra Sindar & Concave Investment Limited v. Chandrika Prasad** Civil Appeal No. ABU 0023/1997, 15th May 1998.

[30] The two main principles emerging from those cases are (a) prejudice or injustice to parties caused not withstanding delay (b) the real dispute or controversy between the parties.

[31] If those main tests are met then leave to amend may be given even at a very late stage of the trial. (vide : **Elders Pastoral Ltd. v. Marr** [1987] 2 PR NZ 383 (CA)).

[32] In the instant case a trial date had not been even assigned.

[33] In **Loutfi v. C. Czarnikow Ltd.** [1952] 2 All ER 823, the trial judge had been prepared to allow the statement of claim to be amended as late as after the close of the case but before judgment.

Re : the Master's reference to earlier judicial proceedings in the High Court and the Court of Appeal 59/2005 where he found that the Appellant had admitted to having built a mezzanine floor

[34] The reference by the Master to the said earlier proceedings and his reasoning can be found at pages 173 to 175 (Vol. 1, RHC).

[35] That was an action filed by the Respondent in this case (as plaintiff) for summary eviction in terms of Section 169 of the Land Transfer Act. Though the plaintiff had succeeded in the High Court, the action for the eviction of the defendant (Appellant in the present case) had been dismissed by the Court of Appeal which had occasioned the filing of the present action.

[36] The learned Master had been struck by the fact that, the present Appellant in the said action had admitted to having built "a mezzanine floor."

[37] But, with the dismissal of that action by the Court of Appeal all that had become history in so far as the said litigation was concerned.

[38] In the result, had the Respondent (present Plaintiff) thought those earlier proceedings impacted on the Appellant's application to amend its initial statement of defence, it was obliged to plead and raise the same in its statement of claim perhaps on the basis of 'res judicata' or 'issue estoppel'.

[39] Having perused as I did the Respondent's statement of claim, (vide: pages 278 to 282 of the RHC, Vol.2), I could not find such a plea. Nor was there any plea or issue raised in the Statement replying to the Appellant's statement of defence dated 25 October 2006. (vide: pages 263 – 267 RHC, Vol.2).

A Judgment allegedly raising *'a res judicata'* should be specifically pleaded

[40] That, a judgment allegedly raising *'a res judicata'* should be specifically pleaded has been a time honoured procedural principle. (vide: **Withers v. Greenwod** [1878] 4 VLR(L) 491; **Houston v. Gligo** [1885] 29 Ch. D. 448 and **Edevain v. Cohen** [1889] 43 Ch. D. 187.

Likewise, a plea of estoppels must be specifically pleaded by setting out the facts relied on

[41] On that proposition or principle, I found a consistent *cursus curiae* from the judicial jurisprudence the Fijian law derives inspiration or assistance from. (vide: **Noall v.**

Middleton [1961] VR 285; **Carl Zeiss Stifting v. Rayner** [1970] Ch. 506 and **Laws Holding Pty. Ltd. v. Short** [1972] 46 ALJR 563 at 571).

[42] Consequently, I am of the view that, the said earlier judicial proceedings which the learned Master took into consideration in refusing the proposed amended statement of defence, at least arguably, fails to bear scrutiny.

The Learned High Court Judge's Judgment in refusing leave to appeal against the order of the learned Master

[43] The judgment of the learned High Court Judge dated 21st October, 2013 is contained at pages 7 to 27 of Vol.1, RHC.

[44] The learned High Court Judge after recapping the pleadings filed in the matter (vide: pages 7 to 13, supra) embarked on an analysis of the same and concluded as follows, largely, if not wholly, adapting the Master's reasoning.

[45] The learned High Court Judge held thus:-

*"(a) Relying on **S. L. Baker Ltd. v. Medway Buildings Supplies Ltd.** [1958] 1 WLR 1216, wherein it had been held that,*

> *"To grant or refuse leave to appeal is a discretionary matter in each case and may be reviewed if it is clear it had been exercised on a wrong principle or a conclusion has been reached it would work a manifest injustice."*

[46] To start with, the learned High Court Judge is seen equating the said judicial thinking in **S. L. Baker Ltd. v. Medway Buildings Supplies Ltd.** (supra) to "exceptional circumstances."

[47] Be that as it may, the learned Judge's entire analysis rested mainly on the Master's approach based on the said earlier proceedings between the parties as would be revealed at pages 14 to 19 of his judgment. (Vol. 1, RHC).

[48] I have stated my reasons earlier as to why those earlier proceedings cannot and ought not to come in the way of a determination on the issue in question in this case in as

much as the present issue being an attempt to seek an amendment to the initial statement of defence allegedly on the basis of a mistake, the question for the Master and consequently, for the learned High Court Judge was whether on that basis, the amendment ought to have been permitted, notwithstanding the fact that, the mistake amounted to even an admission, a proposition for which I found support in the English decision in **Hollis v. Barton** [1892] 3 Ch. 226. I do not think that, the proposed amendment will trigger a whole new process that will set the case back considerably as held in **Hakim Khan v. Westpac Banking Corporation** [2011] HBC 129/09L, Ruling 21 February 2011 for the reasons I had adduced at paragraph [24] earlier in this Judgment.

Did the High Court Judge overreach its Judicial function as statutorily decreed?

[49] Respectfully, I think His Honour did.

[50] An ocular glance at the way His Honour rejected the several grounds of appeal (vide: recapped by him at pages 19 to 22, Vol. 1, RHC) bear this out.

[51] In that approach, the learned High Court Judge appears to have decided on the merits as to whether the proposed amendment to the statement of defence could have been sustained rather than deciding whether there were grounds to seek leave to appeal against the Master's decision as laid down in the established judicial precedents of this Court and the Supreme Court.

Re : Statutory function in granting or refusing leave to appeal and deciding a substantive issue

[52] While I do acknowledge the distinction is sometimes difficult to draw between the two in making a requisite determination, the judicial function, in as much as it is drawn solely from statutory provisions must nevertheless be appreciated, followed and applied.

Application for Leave to Appeal as against a hearing on an Appeal on the merits

[53] Before parting with this judgment I venture to make some further comments which may be useful as a precedent in the context of the granting of leave to appeal against a decision of a lower court in granting or refusing an amendment to pleadings.

[54] Perhaps it is a thin line of demarcation that lies between an application for leave to appeal and an appeal on the merits. Nevertheless, the distinction must be appreciated for it is a distinction with a difference.

[55] While I agree with Ms. Narayan for the Respondent that the merits have to be looked at to some extent, I am inclined to accept Mr. Nagin's broader contention that, the learned High Court Judge had gone beyond that, in effect, deciding as to whether the proposed amendment should have been allowed or not rather than determining whether there was an arguable case for the Appellant to obtain leave having regard to the applicable criteria for the granting of leave such as:-

(a) relative prejudice to parties on account of delay

(b) injustice or otherwise to parties

(c) the need to look at the real dispute or the controversy between the parties etc.

[56] Consequently, while hastening to say that, this judgment ought not to be construed in any way as being one that the High Court was required to grant the proposed amendment for that would have been a determination on the merits, in so far as the principles pertaining to the granting of leave to appeal against the impugned order of the Master is concerned, I hold that, agreeing with Mr. Nagin that, the learned High Court Judge had misdirected and/or non-directed himself in his approach resulting in the judgment that has been canvassed in the present application by the Appellant before this Court.

[57] I am conscious, sitting in the Court of Appeal that, the same considerations apply to this Court as well.

[58] For the aforesaid reasons I proceed to state as follows:

(a) I do not hold that, the proposed amendment to the statement of defence should have been allowed; this Court's function in these proceedings certainly cannot be so as legislatively decreed.

(b) But, the learned High Court Judge was obliged to consider and permit or disallow the application for leave to appeal against the decision of the Master in refusing an amendment of the impugned statement of defence on the criteria *interalia* of

(a) relative prejudice to parties.
(b) relevance of delay in seeking the amendment.
(c) relative injustice to parties etc. as articulated above in this judgment.
(d) To that extent and in that regard the High Court Judge's treatment of the Master's order in my view, does not bear scrutiny for the reasons stated earlier.

Conclusion

[59] For the aforesaid reasons, I hold that, the Appellant has made out a valid case to obtain leave to appeal from this Court.

[60] I wish to place on record the valuable assistance given to this Court by both Mr. Nagin for the Appellant and Ms. Narayan for the Respondent by way of both oral and written submissions to decide on a matter which was not without difficulty *viz*: the approach a High Court ought to adapt in granting or refusing a leave to appeal application against an order of a lower Court refusing to permit an amendment of pleadings.

Seneviratne JA

[61] I have read the judgment of Guneratne JA and agree with the reasoning and conclusions.

Orders of Court

1. *The Appeal is allowed in respect of the refusal of the High Court to grant leave to appeal against the Master's decision.*

2. *Given the fact that this matter is pending from the year 2006, the High Court is directed to hear the matter of the Appeal against the Master's Order dated 30th December, 2010 expeditiously.*

3. *Although there is the principle that costs must follow the event, given the fact that, the Appellant had procrastinated for two years to seek an amendment to its initial statement of defence, the Appellant is ordered to pay a sum of $5,000.00 as costs to the Respondent within 21 days hereof.*

Hon. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice L. Seneviratne
JUSTICE OF APPEAL