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

CIVIL APPEAL NO. ABU 13 OF 2019
(High Court Civil Action No: HBC 325 of 2012)

BETWEEN : **PARSHOTAM LAWYERS**

Appellants

AND : **DILIP KUMAR and JYOTSNA KUMAR t/a BIANCO TEXTILES**

Respondents

Coram : **Calanchini P**

Counsel : **Mr D Sharma for the Appellants**
Mr J Connors with Mr V Maharaj for the Respondents

Date of Hearing : **26 August 2019**

Date of Ruling : **25 September 2019**

RULING

[1] This is a renewed application for leave to appeal an interlocutory decision of the High Court delivered on 23 January 2017. The renewed application was made by summons

filed on 5 March 2019 and was supported by an affidavit sworn on 5 March 2019 by Subhas Chandra Parshotam. The application was opposed by the Respondents. No further affidavit material was filed. The parties filed written submissions prior to the hearing. It should be noted that the application for leave to appeal is accompanied by an application for a stay of the proceedings in the High Court in the meantime in the event that leave is granted. The application for leave to appeal is made pursuant to section 12(2)(f) of the Court of Appeal Act 1949 (the Act) and Rule 26(3) of the Court of Appeal Rules (the Rules).

[2] The background facts to the dispute may be stated briefly. The respondents (the Kumars) were tenants and occupiers of a bulk store located at 49 Dabea Circle, Kalabo, Nasinu (the premises). On 10 September 1994 there was a fire at the premises. The Kumars held a policy of insurance with National Insurance Company of Fiji (now Tower Insurance). The appellants (Parshotam Lawyers) were instructed to act on behalf of the Kumars to make a claim against the insurance company for the loss suffered by them as a result of the fire.

[3] On 18 September 1995 Parshotam Lawyers commenced an action by writ on behalf of the Kumars against the insurance company in the High Court claiming damages for loss. On an application by the insurance company, the action was struck out since the proceedings were not commenced within the 12 months period prescribed by clause 18 of the insurance contract. The Kumars appealed to the Court of Appeal. The appeal was dismissed and subsequently leave was given by the Court of Appeal for the Kumars to appeal to the Supreme Court.

[4] On 9 May 2012 the Supreme Court dismissed the appeal. Parshotam Lawyers had continued to act for the Kumars throughout the proceedings all the way to the conclusion of the Supreme Court appeal. The Kumars commenced the present action on 12 December 2012 claiming damages for breach of contract and professional negligence arising out of the failure to make a timely claim against the insurance company for the loss suffered as a result of the fire. The action was defended and amended pleadings

were subsequently filed by the parties. Then on 2 February 2016 Parshotam Lawyers filed a summons seeking an order that the action be struck out on the basis that the six years limitation period for commencing the action had expired on 10 September 2001. On 29 April 2016 the Kumars filed an amended summons seeking leave to amend their reply to the defendant's amended defence and counterclaim. The applications were heard together. The learned High Court Judge in a Ruling delivered on 23 January 2017 dismissed the application to have the claim struck out and allowed the Kumars' application to amend their reply to the defendant's amended defence and counterclaim. Costs were awarded to each party in the same amount thereby enabling the costs to be set-off by the parties.

[5] Being dissatisfied with that interlocutory decision Parshotam Lawyers filed and served a timely application seeking leave to appeal and a stay of proceedings. The affidavit in support of that application was sworn on 7 February 2017 by Subhas Chandra Parshotam who at paragraphs 6 and 8 deposes to grounds of appeal against both aspects of the interlocutory decision. In a Ruling delivered on 20 February 2019 (almost two years after the hearing on 31 March 2017) the learned High Court Judge refused the application for leave to appeal and the application for stay of proceedings. The present application is therefore the renewed application for leave and stay.

[6] The proposed grounds of appeal are set out in a draft notice of appeal annexed to the supporting affidavit. In that draft notice Parshotam Lawyers refer to the date of the impugned judgment as being 23 January 2016 whereas the date of delivery of the interlocutory decision the subject of the present application is 23 January 2017. The error will be regarded as a typographical error. The grounds of appeal upon which the appellants rely are:

> *"A. His Lordship erred in not finding the Plaintiffs' cause of action, if any, arose on 10 September 1995.*
>
> *B. His Lordship erred in finding a separate cause of action existed which arose on 12 May 2012.*

C. His Lordship erred by failing to find that the Plaintiffs' claim was statute barred pursuant to Section 4 of the Limitation Act [Cap 35].

D. His Lordship erred in failing to distinguish the decision in Hawkins v Clayton (1987 – 1988) 164 CLR 539 on its facts.

E. His Lordship erred in not striking out the Plaintiffs' claim pursuant to Order 18 Rule 18(1) of the High Court Rules 1988.

F. His Lordship erred in permitting a reply which would operate outside the ambit of Order 18 Rule 3 of the High Court Rules in so far as it raised a new case not pleaded in the Amended Statement of Claim.

*G. The proposed Amended Reply would be embarrassing to the Defendants and contrary to the decision of **Williamson v London and North Western Railway Co** (1879-1880) 12 Ch D 787 at 793 (referred to under O.18 r.3 of the White Book)."*

[7] It must be noted that the application before this Court is not an application for leave to appeal or an appeal against the decision of the High Court dated 20 February 2019 refusing leave. This is a fresh application in the form of a renewed application for leave to appeal the interlocutory decision delivered on 23 January 2017. It is not the function of this Court to review the decision of the learned High Court Judge refusing leave to appeal. This Court is exercising a concurrent original jurisdictional in applications such as that presently before the Court.

[8] It follows that the grounds of appeal upon which the appellant relies will be considered, for the purposes of determining leave, in the context of the interlocutory decision delivered on 23 January 2017. The submissions filed by the appellant make clear reference, in paragraph 1, to the Ruling dated 20 February 2019, refusing leave to appeal. As a result the Court can only derive limited assistance from those submissions.

[9] The matters that should be considered in an application for leave to appeal the interlocutory decision delivered on 23 January 2017 are well-settled. In **Totis Incorporated, Spor (Fiji) Limited and Richard Evanson –v- Clark and Sellers** (unreported ABU 35 of 1996, 12 September 1996) at page 15 Tikaram P observed:

> *"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. It is for this reason that leave to appeal against such orders is usually required.*
>
> *Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed.*
>
> *The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances."*

[10] In **Kelton Investments Ltd –v- Civil Aviation Authority of Fiji** [1995] FJCA 15; ABU 34 of 1995, 18 July 1995 Tikaram P had cause to visit this issue and in doing so referred to the reasoning of Murphy J in **Nieman –v- Electronic Industries Ltd** [1978] V.R. 431 who stated at page 441:

> *"_ _ _ the Full Court (of the Victorian Supreme Court) held that leave should only be granted to appeal from an interlocutory judgment or order in cases where substantial injustice is done by the judgment or order itself. If the order was correct, then it follows that substantial injustice could not follow. IF the order is deemed to be clearly wrong, this is not alone sufficient. It must be shown, in addition to affect a substantial injustice by its operation."*

[11] In the **Kelton Investments** Ruling (supra) Tikaram P also noted that:

> *"If a final order or judgment is made or given and the Applicants are aggrieved they would have a right of appeal to the Court of Appeal against such order or judgment. Therefore no injustice can result from refusing leave to appeal."*

[12] More recently this Court observed in **Shankar –v- FNPF Investments Ltd and Anr.** [2017] FJCA 26; ABU 32 of 2016, 24 February 2017 at paragraph 16:

> *"The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (**Nieman –v- Electronic Industries Ltd** [1978] V.R. 431 and **Hussein –v- National Bank of Fiji** (1995) 41 Fiji L.R. 130).*"

[13] Turning first to the appellant's application seeking leave to appeal the interlocutory decision dismissing the application to strike out the Kumar's action. The application had been made under O18 R18 of the High Court Rules. The summons was filed on 2 February 2016 and was supported by an affidavit sworn on 2 February 2016 by Subhas Chandra Parshotam.

[14] The basis of the application was that the cause of action arose on 10 September 1995 whereas the writ of summons was issued on 12 December 2012. As a result the action was out of time since the limitation period of six years had expired on 10 September 2001. The issue of the limitation period had been pleaded in the appellant's defence filed on 16 January 2013 and repeated in the amended defence filed on 10 December 2014.

[15] The position of the Kumars is that Parshotam Lawyers continued to act in the matter until 11 May 2012. It was on that day that the Kumars were advised to seek alternative legal advice. This advice from Parshotam Lawyers followed the conclusion of the unsuccessful litigation in the Supreme Court whereby the Kumars sought to challenge the decisions of the High Court and the Court of Appeal. Parshotam Lawyers had challenged the ruling that the action for damages (perhaps more accurately compensation by way of indemnity under the policy) was barred by the term in the policy restricting claims to 12 months from the date the loss was suffered.

[16] The issue before the learned Judge was to determine when the cause of action arose since section 4(1) of the Limitation Act 1971 required the action to be commenced within six years from the date on which the cause of action arose.

[17] The learned Judge concluded that the cause of action against Parshotam Lawyers arose on 11 May 2012 being the date when the appellants advised the Kumars to seek alternative legal advise. The Judge took the view that the appellants should not be permitted to rely on their own conduct to defeat the Kumar's claim.

[18] In my judgment it would be unreasonable to expect the Kumars to commence an action for professional negligence on the part of their lawyers when those same lawyers had commenced proceedings which they took all the way to the Supreme Court to establish in effect that they had not delayed in bringing an action for damages (compensation) against the insurance company. It was only when the Supreme Court dismissed the appeal that the Kumars could be finally satisfied that their claim against the insurance company could not proceed on account of the delay by Parshotam Lawyers.

[19] At this stage I am compelled to comment briefly on the stance taken by the appellants in the present proceedings. First, in the defence and the amended defence delivered by Parshotam Lawyers it is claimed that the firm had been told not to file court proceedings until instructed to do so. However there is no reference to those instructions in the affidavit filed by Parshotam Lawyers. Secondly there is no explanation in either the defence or in the affidavit material as to why or on whose instructions Parshotam Lawyers had commenced proceedings on 18 September 1995. Thirdly, the bona fides of those appeal proceedings in the Court of Appeal and the Supreme Court must be considered in view of the comments by Marshal J (with whom Gates CJ and Sriskandarajah J agreed) in **Kumar and Kumar –v- The National Insurance Company of Fiji Limited** [2012] FJSC 10; CBV 9 of 2008, 9 May 2012 at para. 21:

> *"I am surprised that leave was given by the Court of Appeal in this case which at all times has been barely arguable. I do not think the Court would*

> *have given special leave on a petition. That because of the little chance of success where the Courts below had fully and correctly expounded the applicable principles."*

[20] I am of the view that it is unconscionable for the appellants to seek to have this action struck out when, by their own actions in pursuing the appeals against the Ruling of the High Court striking out the action filed on 18 September 1995, they had caused time to run to 2012. There is absolutely no injustice in allowing the Kumars to pursue their claim against Parshotam Lawyers for the firm's failure to pursue the claim before 10 September 1995.

[21] I am also concerned about the inconsistency between the material filed in the present proceedings and the contents of a letter to which Marshall J referred in his judgment in **Kumar and Kumar v The National Insurance Company of Fiji Limited** (supra). At para. 7 Marshall J observed:

> *"It seems that the Plaintiffs' solicitors (Parshotam Lawyers) were aware that pursuant to clause 18 of the policy it would be advisable to file proceedings against the insurer on or before 12 September 1993. This is because on 6 September 1995 they wrote to the solicitors for the insurers that they had instructions "to urgently issue a writ _ _ _ against your client unless we have settlement _ _ _forthwith."*

[22] For all of the afore-going reasons the application for leave to appeal the interlocutory decision refusing the striking out application is refused.

[23] Turning to the second aspect of this application challenging the Ruling of the High Court allowing the Kumars to deliver an amended reply. After briefly reviewing relevant case law the learned High Court Judge allowed the Kumars to amend the Reply to the Defendants Amended Defence and counterclaim.

[24] At the outset it must be noted that this aspect of the application will be considered on the basis that this Court has concluded that leave to appeal the striking out decision has been refused. The effect of that decision is that the limitation period runs from 11 May 2012.

[25] When Parshotam Lawyers decided to rely on the limitation period the defence was the appropriate pleading to raise the issue. The benefit of the limitation period was a matter for Parshotam Lawyers to claim. Consequently it is not necessarily wrong for the Kumars to seek to plead in an amended reply facts upon which they proposed to rely to show that the action was not barred. It seems to me that this approach is consistent with pleading theory although there is an opposing argument that facts rendering the claim enforceable beyond the limitation period should be pleaded in the Statement of Claim on the basis that the fewer documents passing between the parties the cheaper the process. As a matter of law, however, the reply or even an amended reply is the appropriate pleading for that material.

[26] The objection raised by Counsel for the appellants is that the reply raises a fresh or second cause of action in negligence. However in my judgment the amended reply should be considered as and limited to doing no more than pleading facts which go to establish that the limitation period should be regarded as running from 11 May 2012 rather than 10 September 1995 and was as a result not barred.

[27] The reply should not be and cannot be regarded as raising a second cause of action in negligence. The only claim before the High Court is that arising from the failure to commence the action against the insurance company within the limitation period prescribed in clause 18 of the policy. For the purpose of that action the pleadings claim that the limitation period runs from the 11 May 2012. That is the consequence of the amended reply. The allegations of fact in the pleadings should be left to the evidence at the trial. There is no injustice to the appellants by allowing the action to proceed to trial on the issues raised by the pleadings. Leave to appeal this aspect of the interlocutory decision is also refused.

[28] As a result the renewed application for leave to appeal is refused. It follows that the application for a stay pending an appeal must be refused. The respondents are entitled to costs which are summarily fixed at $2,500.00. Given that this was an application for leave to appeal an interlocutory decision, I am not prepared to award any disbursements for overseas Counsel.

Orders:

1. *Renewed application for leave to appeal the interlocutory decision dated 23 January 2017 is refused.*

2. *Stay of High Court proceedings refused.*

3. *The appellants (Parshotam Lawyers) are ordered to pay costs to the Respondents in the amount of $2500.00 within 21 days from the date of this Ruling.*

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL