

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

**CIVIL APPEAL NO. ABU 15 OF 2018**  
**(High Court HBC 327 of 2009)**

**BETWEEN** : **ABBCO BUILDERS LIMITED** *Appellant*

**AND** : **NEW INDIA ASSURANCE COMPANY LIMITED** *Respondent*

**Coram** : Calanchini P

**Counsel** : Mr C B Young for the Appellant  
Mr T Tuitoga for the Respondent

**Date of Hearing** : 1 May 2019

**Date of Ruling** : 10 May 2019

**RULING**

- [1] This is an application for an enlargement of time within which a notice of appeal against the final judgment of the High Court may be given.

- [2] The judgment was pronounced on 29 March 2016 whereby the appellant succeeded in its claim on liability against the respondent but was unsuccessful in its claim for damages for damage to a retaining wall. The issue before the High Court was whether the damage was caused by flood or due to the run-off surface water hitting hard on the retaining wall. The court below found for the Appellant holding that the damage was caused by run-off surface water but concluded that the appellant failed to prove the quantum of damages claimed and as a result the claim for damages was dismissed.
- [3] The present application is made by summons filed on 12 March 2018 and was supported by an affidavit sworn on 9 March 2018 by Lekh Ram Narayan. The application was opposed by the respondent who elected not to file affidavit material. Both parties filed written submissions prior to the hearing.
- [4] The application is made pursuant to Rule 17(3) of the Court of Appeal Rules (the Rules). Section 20(1) of the Court of Appeal Act 1949 (the Act) gives to a judge of the Court power to enlarge time.
- [5] The appellant initially filed a timely appeal in 2016 (ABU 30 of 2016). However due to non-compliance with Rule 18(5) of the Rules the appeal was deemed to have been abandoned pursuant to Rule 18(10). The appellant was then required to commence the appeal process under the provisions of Rule 17. The date of deemed abandonment is of some consequence in this case. However even on a finding that is most favourable to the appellant that date can reasonably be regarded as being 13 October 2016 being the date upon which the appellant filed the settled appeal record without having consulted the respondent prior to that date as to the contents of the record. It was not until 12 March 2018 that the appellant filed the present summons seeking an enlargement of time under Rule 17(3). This was necessary because the appellant had failed to take advantage of the opportunity given by Rule 17(2) to file a fresh notice of appeal as of right within 42 days of the date of deemed abandonment. Time to do so had expired on 24 November 2016.

- [6] The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in **NLTB (now TLTB) –v- Khan and Another** [2013] FJSC 1; CBV 2 of 2013, 15 March 2013. The court will consider (a) the length of the delay, (b) the reason for non-compliance, (c) whether there is a ground of merit justifying the appellate court’s consideration, or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced.
- [7] The length of time between the date of deemed abandonment of the appeal (13 October 2016) and the date of filing the present application (12 March 2018) is about 17 months. When taken into account, the 42 days allowed by Rule 17(2) to file a fresh notice of appeal as of right, reduces the delay to the period 24 November 2016 to 12 March 2018 being a period of about 15½ months.
- [8] By any standard the delay is inordinate. However it can be to a limited extent explained by the fact that up until 28 February 2018 both parties continued to negotiate the contents of the record and the Registry ignoring the fact that there had been non-compliance with Rule 18(5). The Registry was complicit in these negotiations and failed to advise the parties that the appeal was deemed to have been abandoned as at 13 October 2016. Although not an excuse it is not an unreasonable explanation. Both the Respondent and the Registry had allowed the appellant to proceed as if the appeal was still existent.
- [9] Nevertheless, it is the appellant whose non-compliance with the Rules has resulted in the need for the present application. It is therefore necessary to determine whether there is a ground of appeal that can justify the Court’s consideration. The proposed grounds of appeal are set out in a draft notice annexed to the appellant’s supporting affidavit. They are as follows:

“1. *The learned trial Judge erred in law and in fact in holding that the Appellant had failed to prove its loss or damages when there was uncontradicted evidence to prove, on the balance of probabilities, such loss or damages.*

2. *The learned trial Judge had an obligation to assess damages in accordance with principle and he failed to do the best he could on the evidence before the Court.*
3. *The learned trial Judge failed to consider the Appellant's claim for breach of s.11 of the Insurance Law Reform Act 1996 and thereby erred in law and in fact.*
4. *The learned trial Judge erred in law and in fact in now awarding to the Appellant the costs of the action."*

[10] The appeal is concerned with the finding of the learned judge that the appellant, although successful on liability, had failed to prove the claim for damages. The evidence that is required depends to some extent on the pleadings and the terms of the policy. The contract is one that requires the parties to act with the utmost good faith. Being an insurance contract the issue is what amount of compensation by way of indemnity is the appellant entitled to. Another issue that arises under such contracts is whether the quantum is described as general damages or special damages. Another issue is whether the insurer is liable upon proof of the occurrence or upon proof of payment having been made by the insured to repair the damage to the property.

[11] It is clear that the appellant has suffered loss and damage for which the insured has been found to be liable. What exactly the appellant was required to establish and the method by which the quantum of the loss needs to be established are matters that should be considered by the Court of Appeal.

[12] In my judgment there will be no unfair prejudice to the Respondent in the event that the application is granted. An enlargement of time should be granted on the condition that the appellant pay the respondent's costs.

**Orders:**

1. *Enlargement of time is granted.*
2. *Appellant is to file and serve a notice of appeal within 14 days from the date of this Ruling and thereafter to comply with Rules 17 and 18 of the Rules.*
3. *The appellant is to pay costs to the Respondent in the sum of \$2,000.00 within 14 days from the date of this Ruling.*
4. *In the event of non-compliance by the appellant with either order 2 or order 3 above the appeal is deemed to have been abandoned.*



*W. Calanchini*  

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**Hon. Mr. Justice W Calanchini**  
**PRESIDENT, COURT OF APPEAL**