

IN THE COURT OF APPEAL, FIJI
[APPELLATE JURISDICTION]

Civil Appeal No. ABU 0100 of 2018
(HBC No. 155 of 2009)

BETWEEN : **BRETT WHITTAKER and LOUISE WHITTAKER**

Appellants

AND : **BANK OF SOUTH PACIFIC**

Respondent

Coram : **Almeida Guneratne, JA**

Counsel : **Mr. K. Patel for the Appellant**
Mr. J. Apted and Ms. W. Chen for the Respondent

Date of Hearing : **27 July 2020**

Date of Ruling : **28 August 2020**

RULING

- [1] The present application raises several issues, procedural mixed with substantive aspects. I shall begin by tracing the background events and the ensuing orders of “the Master” followed by the High Court ultimately leading up to the present application before me.

The Master's Ruling

- [2] By the "Master's ruling" dated 16 December, 2016 the plaintiffs-appellants (hereafter referred to as the Appellants) claim was struck out for failure to give inspection (discovery) of certain documents.

The Ruling of the High Court

- [3] The Appellants' application for leave to appeal against the Master's ruling which was admittedly an interlocutory ruling and out of time (again admittedly) was refused by the High Court by its ruling dated 28 February, 2018 on the finding that the Appellant's delay of 5 ½ months was substantial and the reasons for the delay were unsatisfactory. It is to be noted that the delay was due to the Appellant having to make a renewed application before the High Court.
- [4] The Appellants thereafter having filed a leave application against the 28 February, 2018 of the High Court the same was also refused by the High Court in its ruling dated 20 July, 2018, which the Respondent concedes was on the basis of a misapplication of the relevant rules of Court. Be that as it may to my mind nothing turns on that, probably the reason why the Appellants have not put in issue the said July ruling of the High Court.
- [5] It is in that afore-counted background that the present application came before me for consideration.

The Present Application before this Court

- [6] The present application is for leave to appeal the Master's ruling of 16 December, 2016 and for enlargement of time for leave to appeal the said ruling.
- [7] Pending the said application, the Appellants sought a fresh summons to amend their original application against the "Master's ruling" by including the High Court ruling of 28 February, 2018 (sic) as well which was granted by me on 30 June, 2020

(without objection by Counsel for the Respondent thus avoiding further delays in this matter)

Assessment of the rival submissions of Counsel and matters urged in the present application with my initial reflections thereon.

- [8] Conceding that, in making the present application before this Court there has been a delay, learned Counsel in seeking leave for extension of time relied on the decision of Justice Suresh Chandra in **Suva City Council v Saumatu** (2017) FJCA 150.
- [9] That was in the context of “the jurisdiction issue” as to whether this Court could entertain the present application.
- [10] In that regard I looked at the submissions of learned Counsel for the Appellant contained in the written submissions dated 10 December, 2018 which learned Counsel reiterated in his oral submissions.

7. The procedure outlined in Suva City Council (supra) for extension of time for leave to appeal an interlocutory judgment delivered by a Judge would apply in toto for leave to appeal an interlocutory judgment delivered by a Master.

8. The Appellant challenged the Master’s Ruling which was an interlocutory order. Thus, section 12 (2) (f) was activated and leave was required.

9. Rule 26 (3) requires that leave to appeal should be first exhausted in the lower court before being made to Court of Appeal. However, this is only possible if the leave to appeal application is made within time prescribed by rule 16 of the Court of Appeal Rules.

10. If the application is out of time then the application for extension of time for leave to appeal should be made directly to Court of Appeal pursuant to section 20 (1) (b) of the Court of Appeal Act. The lower court does not have the

power to grant an extension of time for leave to appeal. Your Lordship had exhaustively analysed this in Shankar v FNPF Investments [2017] FJCA 26; ABU32.2016 (24 February 2017)”.

- [11] As against that, learned Counsel for the Respondent relied on the case of **New India Assurance Company Ltd v Panache Investment Ltd** (Supra) and laid stress on what Calanchini P said in that case. His Lordship said;

“11. The Appellant made the application for extension of time for leave to appeal before Justice Ajmeer sitting as a single judge of the High Court. This application was in the first instance in the lower court. Justice Ajmeer heard and refused the application.

12. The application was misconceived in procedure as per Shankar (supra) and should have been made to Court of Appeal since it was out of time. However, Justice Ajmeer in his decision wrongly held that extension of time for leave to appeal could be provided pursuant to Order 3 Rule 4 of the High Court Rules.

13. Subsequently, the Appellants made another application before Justice Ajmeer which was dismissed for want for jurisdiction as per the principles enunciated in Panach Investment Ltd (supra) and Sakiusa Soli (supra), (2017) FJCA 46 and ABU 66.2016, 22 September, 2017).

14. The Appellant's present application before to the Court of Appeal is a renewed application for extension of time for leave to appeal against the Master's Ruling and not against the refusal of grant of leave by the Judge's decision made in the first instance. Hence, the application is proper and compliant in accordance with the procedure in Shankar (supra) and Suva City Council (supra).”

- [12] Reflecting on the rival submissions, for my part, I could not see any conflict in regard to “the jurisdiction issue”, although much labour was spent on that. Even if it could be argued that there is a conflict, both decisions of Chandra J.A. and Calanchini, P, being

rulings of a single Judge, it is a fit matter for the final Full Court to make a final determination on, for which reason alone I am inclined to grant leave to appeal.

Length of Delay and Reasons for the delay

[13] Those are two matters which as I saw had consumed considerable time of Counsel.

[14] In fairness to Counsel for the Respondent, I do say that I was not convinced that the Appellants have satisfied those criteria. While the delay has been conceded, I was not myself satisfied with the reasons adduced therefor.

[15] However, going on past precedents of this very Court to which I myself have contributed

I am unable and indeed cannot decide the matter on that score alone, notwithstanding the **Emmet Kent Morgan v Ravindra Lal** ABU 132 of 2017 per Calanchini, P. and the **Sakiusa Soli's case** (Supra).

[16] Having said all that, being mindful of the Supreme Court decision in **NLTB v Ahmed Khan**, CBV 2 of 2013, 15 March 2013 and the more recent Supreme Court decision in **Fiji Industries Ltd v. National Union of Factory and Commercial Workers** (CBV 008 of 2016, 27 October, 2017 as per the views expressed therein by His Lordship Justice Keith), that the criteria in granting applications of this nature must be taken as a whole, I felt it obligatory on my part to look at the merits of this matter.

The Merits

[17] “The Master” struck out the Appellants claim for non-compliance with orders made in regard to inspection (discovery) of documents sought by the Respondent.

[18] Was that the only consequence that could follow for such non-compliance? Could “the Master” and indeed should the Master have decided the matter before him on the basis that still a fair trial could have been held without those

documents casting perhaps the Appellants in costs for non-compliance or even going further in charging them for contempt of Court?

[19] In that regard I gave my mind to the thinking of Lord Justice Lloyd in **Landauer Ltd v. Comins & Co.** The Times, August 7, 1991.

[20] Apart from that, I was also persuaded by Appellants' Counsel's contention as to whether the "learned Master" had properly exercised discretion in striking out the Appellants' claim which was not in conformity with the principles laid down in the decision of Lord Justice Millet in **Logicrose Ltd v Southern United Football Club** (The Times March 5, 1988).

[21] One last point needs to be addressed.

[22] Learned Counsel for the Respondent submitted that the grounds of appeal raised purport to be "errors of law and fact" whereas only errors of law are to be considered since the decision appealed are interlocutory in nature. Grounds 1 and 3 are in respect of the "Master's Ruling" and Ground 4 is in respect of the "High Court ruling".

[23] The Appellant has addressed this matter in their Reply Written Submission dated 17 August, 2020 relying on the case of **Mohammed v Khan** [2016] FJCA 140, per Justice Calanchini.

[24] I fully endorse the thinking of Justice Calanchini in that case in as much as words employed in the grounds of appeal urged by a party cannot and indeed, ought not to be regarded as the test to determine as to what constitutes a question of law.

What are the tests for determining as to what constitutes a question of law?

[25] In my quest to find an answer to that, among the many precedents I endeavoured to look at from various jurisdictions, I found useful guidance in

the Indian Supreme Court decision in Chunilal Mehta v The Century Shipping and Manufacturing Co. Ltd [1962] AIR 1314.

[26] In that case, the Court laid down the following propositions:

1. Inferences drawn from certain facts is also a question of fact but if a finding of fact is arrived after improperly rejecting evidence, a question of law arises.
2. If Court acts on material, partly relevant and partly irrelevant and it is impossible to say to what extent the adjudicating forum was affected by the irrelevant material, it is a question of law.

[27] I adopt those propositions for the purposes of this application before me.

Application of the Said propositions to the instant Case

[28] In the light of the judicial thinking in Mohammed v Khan (supra), taken together with the said propositions laid down in Chunilal Mehta (supra), I take the view that, the aforesaid considerations and/or tests stand satisfied in the grounds of appeal urged by the Appellant.

On the Criterion of Prejudice to Parties

[29] The Appellants in that regard have submitted thus:

“39. The Respondent's purported prejudice appears in the decision of Justice Ajmeer's First Ruling. The prejudice claimed is that the Appellant has failed to comply with their discovery obligation for 12 years. This allegation is false. The Respondent requested the two documents in March 2015. This is evinced in The Master's Ruling at page 5.

40. The Respondent also claim that many of their witnesses have left the bank. They have named two as Laurie Melsop and Mike Walsh. There was no evidence produced before the lower court to say why these witnesses were important and what evidence were they going to tender at trial. Also no information was provided in which year did they leave. The Respondent have relied on a blanket excuse without providing details of its prejudice on which a true assessment can be made. Even if some witnesses had left that does not in itself mean that the Respondent would not be in a position to put up its defence at trial.

41. They also claim that memories of the witnesses in regards to the events would have faded over time. The Respondent is a corporate and certainly would keep logs of its activities. This can be seen from the large number of documents discovered between the parties. If there is any prejudice then it is minimal since the trial would largely be conducted on the basis on documents discovered.

42. The Appellants submit that they have strong grounds of appeal which would succeed should extension of time for leave to appeal be granted.”

Determination and Conclusion

[30] Having given my mind to the respective submissions made on behalf of parties and the grounds of appeal (BW2) which remains an intended appeal currently, I have no hesitation in allowing the Appellants’ application and proceed to make my orders as follows.

Orders of Court:

1. The application of the Appellants seeking leave to appeal “The Master’s” ruling of 16 December, 2016 and the learned High Court Judge’s ruling of 28 February, 2018 is allowed.
2. The Appellants shall pay as costs a sum of \$1,500.00 to the Respondent within 21 days of this Ruling.



A handwritten signature in blue ink, which appears to read "Almeida Guneratne". The signature is written in a cursive style and is positioned above a dotted line.

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Almeida Guneratne
JUSTICE OF APPEAL