

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 047 of 2020
(HBC No. 60 of 2016)

BETWEEN : DOMINION FINANCE LIMITED

Appellant
(Original Plaintiff)

AND : BENJAMIN OYAGAWA, MILITONI and DAVID
BLAKELOCK (as the Trustees of UNITED IMPROVEMENT
ASSOCIATION (United Club or UI)

1st Respondents
(Original Defendants)

AND : KARL SMITH

2nd Respondent
(Original Third Party)

Coram : Almeida Guneratne, JA

Counsel : Mr. M. Kumar for the Appellant
: Mr. A. Nand for the 1st Respondent
Ms. N. Choo for the 2nd Respondent

Dates of Hearing : 24th and 26th November, 2020

Date of Ruling : 08 December 2020

RULING

Background to the Matter

- [1] At the hearing before the High Court, the learned High Court Judge had noted that two of the three trustees (named as Original Defendants in the Caption) “had deceased but no appointments made in that regard. The remaining trustee of the club is represented at the hearing” (Vide: paragraph 6 of the Judgment) However, no orders were made in consequence and the matter had proceeded.
- [2] At the conclusion of the hearing the learned High Court Judge dismissed the original plaintiff’s (the Appellant’s) claim by his judgment dated 27th May, 2020. The Appellant filed Notice and Grounds of Appeal within time prescribed by law. The aforesaid surviving trustee (named as 1st Respondent) then filed a “1st Respondent’s Notice” dated 6th July, 2020 to have the said judgment varied in the event of the Appellant’s appeal being allowed and to have the 1st Respondent indemnified by the 2nd Respondent (original third party) “to the extent of any judgment obtained by the Appellant against the 1st Respondent in the Court of Appeal”.
- [3] In His Lordship’s judgment, the learned High Court Judge, while dismissing the Appellant’s (Plaintiff’s claim) held that there was “no need to consider “Defendant’s third party claim” (That is, the 2nd Respondent) (vide: Paragraph 1 of the judgment).
- [4] Consequently, the 2nd Respondent filed Summons dated 1st September, 2020 for enlargement of time to appeal the judgment of the High Court dated 27th May, 2020.

A Preliminary Procedural Matter that needed to be addressed

- [5] In that factual background when the matter was taken for hearing before me on 24th November, I found the record to be defective in as much as “two of the trustees had deceased” and no steps had been taken by any party who were all agitating for claims and cross claims as evidenced by what I have recapped above.

- [6] All counsel having perhaps realized the delays and resulting protracted proceedings that could follow having moved for time to consider the matter I had the matter taken on 26th November when all counsel jointly moved for the matter to be proceeded with the surviving trustee as the sole 1st Respondent on Record.
- [7] Needless to say, that joint effort would help the full Court as well when it hears the Appellant's Appeal as well.
- [8] In the result what remained for me to consider and determine is in regard to the 2nd Respondent's summons for enlargement of time to file and serve Notice of Appeal against the impugned Judgment of the High Court.

Criteria that need to be satisfied in Seeking enlargement of time to appeal

- [9] Those criteria are well established in the Jurisprudence of this Country.

Length and Reasons for Delay

- [10] In that regard, learned Counsel re-iterating what she has submitted in her submissions of 24th November, 2020 in the light of the supporting affidavit of the 2nd Respondent dated 1st September, 2020 submitted thus:

- “4. On 6th July the 1st Respondent filed a Respondent's Notice wherein it sought to be indemnified to the extent of any damages awarded against the 1st Respondent by the Court of Appeal.
5. Having been served with 1st Respondent Notice on the 11th July, 2020, the 2nd Respondent immediately tried to file his Respondent Notice.
6. Unfortunately, as he lives in Savusavu and due to some email problems the 2nd Respondent's Notice was out of time.
7. An Application was made to enlarge the time to file and serve the Notice was made on 1st September 2020.

8. As stated above, since, the 2nd Respondent resided in Savusavu, it took time to obtain his instructions and provide him the necessary affidavit materials for enlargement of time and by the time the application for enlargement of time as filed the Respondent was out of time by 4 months”.

Reflections on the said submission

- [11] I am afraid, I was not satisfied as to the reasons adduced for the delay as stated in the afore-capped paragraphs of the Applicant’s (2nd Respondent’s) said written submissions. “E-mail problems, residing in Savusavu, taking time to obtain instructions” struck me as being vague.

The Prejudice Criterion

- [12] In that regard (Ms) Choo for the Applicant (2nd Respondent) submitted that:-

“9. It is respectfully submitted that there would be no prejudice caused to either the Appellant or the 2nd Respondent, since the Appellant is not objecting to the 2nd Respondents application for enlargement of time. Secondly, the 1st Respondent whilst having filed an Affidavit in Opposition, does not appear to have locus to object to the application under the Rules.

10. The application for enlargement of time does not affect the 1st Respondent. The application has been filed against the decision of Justice Amaratunga and the Respondent has a right under the Court of Appeal Rules to file his necessary Respondent Notice. Therefore, no prejudice is caused to 1st Respondent who themselves are seeking to vary parts of the Judgment.”

- [13] The said point I found to have been clearly articulated by (Ms.) Choo which I have no hesitation in concurring with and accepting.

Merits in the 2nd Respondent's Intended Appeal

[14] In summary (MS) Choo submitted as follows:-

- (a) At the material time, 2nd Respondent, Karl Smith, was the President of the United Club and the General Manager of Dominion Finance Limited. As a General Manager of the Appellant (DFL) it was within his powers to approve credit facilities beyond \$240,000 without the approval of the Board.
- (b) On around 2014 it was decided by the United Club that given the dilapidating condition of the United Club, the original revolving credit account with DFL would be increased to allow the Club to attend to the refurbishment and upgrade works on the Club premises.
- (c) As the President of the Club, 2nd Respondent over saw the renovation works and all the works were being done in full view of all the club members and the trustees of the Club.
- (d) Upon his departure from the Club as President the newly appointed Trustees refused to pay the revolving account loan to DFL, (there) basis of denying the debt and alleged that the President of the Club acted *ultravires* in not following the Constitution of the Club in holding a special general meeting to obtain approval of the Club to undertake the renovation works.
- (e) DFL sued United Club and subsequently the United Club joined 2nd Respondent as third party to the proceedings on the basis that any adverse judgment against United Club on monetary damages was to be indemnified by him.
- (f) His Lordship *inter alia* ruled that the DFL's claim failed as there was no written application or loan agreement between DFL and United Club. His Lordship further went and deliberated that 2nd Respondent's actions as the General Manager and the President was conflicted and his actions deemed *ultravires* and any decision of the Club required two thirds majority of members in a general meeting.

- (g) DFL's claim was dismissed against United Club. There was no question of indemnity in light of the Judgment.
- (h) The Learned Judge had said that the 2nd Respondent's decision had rendered his act as *ultravires* and outside the ambit of the Clubs Constitution.
- (i) It is submitted that Justice Amaratunga erred in fact in not giving weight to the witnesses for the 1st Respondent who testified that they had seen the renovations works being done and had in fact asked the 2nd Respondent for the breakdown of the costs in a special general meeting. Irrefutable inference ought to have been drawn from these conduct and evidence of the witness that the United Club trustees were fully aware of the renovations been done to the club and had in fact not objected to the same. While the Learned Judge ruled that the actions of the 2nd Respondent were ultra vires and against the constitution of the club, it is to be noted that the United Club trustees never took any disciplinary actions against the 2nd Respondent's alleged conduct if they felt that his conduct was ultra vires.

Determination

- [16] Taking the established criteria on granting extension of time to appeal, the delay admittedly 4 months and reasons therefor being not acceptable to me, the criteria based on "prejudice" and "merits" clearly stand in favour of the Appellant (2nd Respondent).
- [17] In that regard, as a matter of law I felt bound by the well-established precedent laid down by the Supreme Court in NLTB v Khan [2013] FJSC 1, followed by the views expressed in Fiji Industries Limited v National Union of Factory and Commercial Workers; CBV 008 of 2016, [27 October 2017].
- [18] In that latter case, it was said that the applicable criteria for granting extension of time to appeal must be viewed in the overall.

[19] Accordingly, whatever views I might have expressed that may appear to run counter to that, on the basis of what I have referred to at para [18] above, the length and reasons for the delay are far outweighed by the “prejudice” and “the merits” criteria.

Other Adjunct considerations

[20] The Appellant’s (original plaintiff) appeal being before the full Court, the full Court would be in a position to go into and determine the matters in dispute between the parties *inter se*.

[21] Indeed, the learned Judge of the High Court in having held that, the 2nd Respondent had acted in a situation of “Conflict of Interest” (and not even considering his third party claim), it is only fair that, this application by him ought to be allowed. His professional conduct in fact has been indirectly brought into issue.

[22] Apart from that, on the law, there are the indemnity claims urged by the 1st Respondent who opposed the present application of the 2nd Respondent for enlargement of time to appeal the impugned judgment of the High Court, while the Appellant supported it. Not that the 2nd Respondent needed “a cheer leader” but, his evident concern was to vindicate his actions.

Conclusion

[23] Accordingly, for the aforesaid reasons, I am inclined to grant the Applicant’s (2nd Respondent’s) application for extension of time to appeal the impugned Judgment of the High Court.

Some Incidental procedural steps that may need to be taken

- [24] The original plaintiff's appeal is admittedly properly before the full Court. However, there has not been a date (mention or call over) for consequential steps for parties to take.
- [25] Given the fact that, the 2nd Respondent has been given extended time to appeal by this Ruling, the Appellant, the 2nd Respondent as well as the 1st Respondent are directed to file their written submissions concurrently before one month when the Registry places the Appeal on the cause list to be heard by the full Court in which regard all parties will be noticed by the Registry in that regard.
- [26] Accordingly I proceed to make my Orders as follows:

Orders of Court:

1. The Applicant's (2nd Respondent's) application for enlargement of time to appeal the Judgment of the High Court dated 27th May, 2020 is allowed.
2. Parties are to take steps in pursuance and/or in consequence of what is stated at paragraph [24] and [25] above.
3. In the circumstances of the matter, I am not inclined to make any order for costs but the same shall await the outcome of a decision by the Full Court in the Appeal before it.



Almeida Guneratne

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Almeida Guneratne
(JUSTICE OF APPEAL)