IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action No. 46 of 2013

BETWEEN : **SONALISALI ISLAND RESORT LIMITED** a limited liability company having its registered office at C/- KPMG Level 10, Suva Central, Renwick Road, Suva.

PLAINTIFF

AND : **FORTUNE 8 LIMITED** a limited liability company having its registered office at Level 3, Aliz Centre, Martintar, Nadi.

DEFENDANT

Solicitors : Krishna & Company for the Plaintiff
Fa & Company for the Defendant

RULING

INTRODUCTION

1. On 06 August 2014, which was the date marked for the trial of this action, I entered judgment against the defendant in the sum of $227,408.69 plus costs in the sum of $2,000.00. That judgment was entered after I allowed the plaintiff to formally prove its case when neither the defendant company nor its counsel appeared in Court.
2. Some three weeks or so after that judgment, on 29 August 2014, the defendant's then solicitors (O'Driscoll & Company) would file an application under Order 35 Rule 2 and under Order 3 Rule 4 of the High Court Rules 1988 to extend the time for the setting aside application and also to set aside the judgment. That application was heard by Master Ajmeer (as the Learned Judge then was).
3. On 03 November 2014, Master Ajmeer delivered his ruling against the defendant on a preliminary point raised. The point raised was that the application was out of time in that it was filed more than three weeks after my Ruling of 06 August 2014 in violation of the seven day period stipulated under Order 35 Rule 2 within which such an application should be filed.

4. Following Master Ajmeer Ruling, Fa & Company were appointed defendant's solicitors.

APPLICATION TO ENLARGE TIME FOR FILING APPEAL

5. On 24 November 2014, exactly **three weeks** after Master Ajmeer's Ruling, Fa & Company would file a Notice of Appeal against the Master's Ruling[1]. It would appear by an affidavit filed for and on behalf the defendant that:

> the Appellant/Defendant seeks an enlargement of time pursuant to Order 59 r.10 to file a fresh Notice of Appeal.

6. Then, on 21 February 2015, more than three and a half months after the Master's ruling, Fa & Company would file an *inter-partes* Summons under Order 59 Rule 10 seeking the following Orders:

> To enlarge the time period for filling and serving a Notice of Appeal by the Appellant/Defendant against the decision of the Master of the High Court delivered on the 3rd of November 2014.

7. This is the application which I am dealing with at this time. It is supported by two affidavits of Tracy McIver. The first was sworn on 23 February 2015 and the second, on 20 March 2015. The plaintiff opposes the application by an affidavit of Janiece Christine McGrath sworn on 25 March 2015.

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[1] The said Notice of Appeal reads:

1. THAT the decision of the Master dated the 3rd of November 2014 be set aside.
2. THAT the Appellant/Defendant be granted an extension of time pursuant to Order 3 Rule 4(2) of the High Court Rules 1988 to file its application to set aside the decision of the court of the 06th of August 2014 to award judgment against the Appellant/Defendant in the sum of $227, 408.69 (Two Hundred and twenty Seven Thousand Four Hundred and Eight Dollars and Sixty Nine Cents) and to award costs in favour of the Respondent/Plaintiff in the sum of $2,000.00 (Two Thousand Dollars).
3. THAT the decision of his Lordship Tuilevuka J dated the 06th of August 2014 be set aside.

AND TAKE FURTHER NOTICE that the grounds of Appeal are as follows:

1. THAT the Master erred in law and in fact in striking out the Appellant/Defendant's summons dated the 28th of August 2014 for being out of time, when in fact the Appellant/ Defendant was seeking an extension of time from the court pursuant to the relevant High Court Rules to file its summons out of time:
2. THAT the Master erred in law and in fact in holding that the Appellant/Defendant's application to seek an extension of time to file its application to set aside the orders of the court of 06th August 2014 was fatally flawed because the application was not made *ex parte*, was wrong in law as there is no requirement in the High Court Rules that such an application should be made Ex- Parte and further that the making of the Application Inter-Parties did not prejudice the Respondent/ Plaintiff or cause a miscarriage of justice that would have necessitated the striking out of the Appellant/Defendant's application;
3. THAT the Master erred in law and in fact in striking out the Respondent/Plaintiff's summons dated the 28th of August 2014, without properly considering the merits of the application before him and without taking into account the fault in issue was the fault of the solicitor and not of the Appellant/Defendant and that any prejudice to be suffered by the Respondent/Plaintiff could be addressed by an appropriate order for costs;
4. THAT the Master erred in law and in fact in striking out the Respondent/Plaintiff's summons dated the 28th of August 2014 without taking into account that the decision of the court of the 6th of August 2014 was not a decision of the merits, but rather a decision arrived at in the absence of the Appellant/Defendant and its counsel and that it is unjust to allow a judgment for such a substantial amount to stand without giving the Appellant/Defendant the opportunity to put in its defence and be heard in its defence on such a substantial claim.
5. THAT the Appellant/Defendant reserves the right to file further and better grounds of appeal.

ORDER 59

8. **Order 59 Rule 10** provides as follows:

> (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period."
>
> (2) An application under paragraph (1) shall be made by way of an inter parte summons supported by an affidavit.

9. **Order 59 Rule 9** provides:

> 'An appeal from an order or judgment of the Master shall be filed and served within the following period-
>
> (a) 21 days from the date of delivery of an **order** or judgment;
> (b) In the case of an interlocutory **order** or judgment, within 7 days from the date of the granting of leave to appeal.

10. In my view, relying on **Goundar v Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008), the Master's Ruling was an interlocutory one[2].

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[2] Goundar v Minister for Health said:

27. All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision.
28. In England the test whether an order is interlocutory or final depends on the nature of the application (*White v Brunton* (1984) QB 570) and not on the nature of the order as eventually made.
29. In Australia the courts have taken an "*order approach*", so that the order appealed from, not the nature of the application before the trial judge, is determinative. So in Australia for example, an order refusing to grant a declaration is interlocutory but the grant of a declaration is a final order.
30. In Fiji the Court of Appeal in *Suresh Charan v Shah* (1995) 41 FLR 65 [Kapi, Thompson, Hillyer JJA] held that refusal by the High Court to grant leave for Judicial Review is an interlocutory order. The Court of Appeal further held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons for not doing so and accordingly adopted the "*application approach*".
31. That decision was followed in *Shore Buses Ltd v Minister for Labour* FCA ABU0055 of 1995, a case of dismissal of proceedings for want of prosecution.
32. In *Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors* [2004] Vol 1 Fiji CA 213, [Ward P, Eichelbaum, Gallen JJA] the appellant filed an application for judicial review of a decision of the Major Tenders Board. The appellant appealed to the Court of Appeal. The respondent took the preliminary objection that the appeal was not properly instituted because it required leave.
33. The Court of Appeal overruled *Suresh Charan v Shah* (supra) and Shore Buses (supra) and held that the "*order approach*" was the correct approach in Fiji. The Court sought to distinguish the earlier cases on the facts (in both Suresh Charan & Shore Buses the appellants had other remedies) but the Court's reasoning is not clear.
34. The vice in the "*order approach*" is that where leave to appeal has not been obtained the parties may not know whether or not it was required until the case comes on for hearing before the Court of Appeal and a close examination of the order and its effect can be argued.
35. It seems to this Court that the "*application approach*" is the correct approach for the reasons stated in *Suresh Charan v Shah* and for the additional reason of legal certainty.
36. As a matter of fundamental principle a court ought not overrule itself unless there are compelling grounds for doing so but this is what the Court in Jetpacker (supra) did. In overruling Jetpacker supra) the Court is restating the law as it was, but more importantly it is doing so to return legal certainty to the law of Fiji. This is especially important in 2008 where it has been some years since the Fiji Law Reports were published where decisions of this Court cannot always be readily accessed by practitioners. Practitioners and litigants need to know with certainty whether a decision is interlocutory and therefore whether an appeal from that decision needs leave.
37. This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.
38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:
    1. an application to stay proceedings;
    2. an application to strike out a pleading;
    3. an application for an extension of time in which to commence proceedings;
    4. an application for leave to appeal;
    5. the refusal of an application to set aside a default judgment;
    6. an application for leave to apply for judicial review.

11. Under **Order 59 Rule 11**, an application for leave to appeal an interlocutory order of the Master must be filed and served within 14 days of the Order. If out of time, **Rule 10** makes provision for an application to enlarge time.

PRINCIPLES

12. The principles applicable when faced with an application under Rule 10 are the same ones that apply when seeking leave to appeal out of time. These are well settled in Fiji (see **McCaig v Manu** [2012] FJSC 18; CBV0002.2012 (27 August 2012) as per Gates P). They require that the applicant must meet the following:

(i) length of delay;
(ii) reason for the delay;
(iii) chance of appeal succeeding if time for appeal is extended; and
(iv) degree of Prejudice to the Respondent if application is granted.

ANALYSIS

Length & Reasons For Delay

13. The affidavit of Tracy McIver sworn on 23 February 2015 sets out the reasons for the lateness in filing the Notice of Appeal which I accept[3].

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[3] McIver's Affidavit deposes as follows:

BACKGROUND

1. .....
2. ..... the date of the Hearing of this matter was not told to the Company by the Company's then legal counsel, Messrs, O'Driscoll, as a result of which the Company was not in attendance in Court on the Hearing date. The Company was also not aware, that its legal counsel did not attend Court on the Hearing date.
3. ..... the Judgment that the Respondent/Plaintiff relies on is not a Judgment on the merits of the case but a Judgment delivered in the absence of the Appellant/Defendant.
4. ..... the Appellant/Defendant has a good defence to the Respondent/Plaintiff's claim in Civil Action No. HBC 46 of 2013.
5. .....on the 29th of August 2014, the Company filed an application to set aside the default Order of the 13th of August 2014 pursuant to Order 35.r 2 and that time be extended under Order 3r.4 of the High Court Rules 1988.
6. ..... on the 03rd of November 2014, the High Court delivered its ruling on the Company's application to set aside the Default Order and dismissed the same. The Appellant/Defendant has since engaged Messrs, Fa & Company to act on its behalf in this matter.
7. ..... on the 24th of November 2014, ... Messrs, Fa & Company had filed an appeal against the decision of the Master. Upon filing the Notice of Appeal and Grounds of Appeal were subsequently served on Messrs, Krishna & Company, the Solicitors for Sonaisali Island Resort Limited.
8. ..... upon filing its Notice of Appeal, the Appellant/Defendant was required to file an Affidavit of Service within 7 days and a Summons for Directions and fixing of the Appeal for Hearing within 21 days.
9. ..... the Respondent/Plaintiff has been served with the Appeal on the date it was filed but the Appellant/Defendant's Summons for Directions and fixing of the Appeal for Hearing has not been filed.
10. .....the Appellant/Defendant seeks an enlargement of time pursuant to Order 59 r.10 to file a fresh Notice of Appeal.

INTERVENING MATTERS

11. .....after the 24th of November 2014 which the Appellant/Defendant lodged its Notice of Appeal, intervening matters arose that pre-occupied the Appellant/Defendant and resulted in the Appellant/Defendant missing its deadline to file its Summons to fix its Notice of Appeal for Hearing and for Directions.
12. ..... sometime after the 24th of November 2014, the Appellant/ Defendant in this matter had become aware that a Winding Up Petition has also been filed against it in Lautoka based on the Judgment which is being appealed in this matter.
13. ..... the Appellant/Defendant only became aware of the Winding Up Petition upon being informed by its former Accountants, Aliz that a Winding Up Petition against the Appellant/Defendant had been left at its offices.
14. .....upon undertaking inquiries, the Appellant/defendant became aware that this Winding Up Petition was in fact commenced on the 19th of September 2014 whilst proceedings in the High Court were on foot.

14. I am prepared to accept the above as adequate explanation for the length of, and reasons for, the delay in filing the application.

Chance of Appeal Succeeding If Time Extended

15. The Master's decision was handed down on 03 November 2014. As I have said, he was dealing with a preliminary objection that the Summons To Set Aside Default Order as well as the prayer seeking an Order that time be extended under Order 3 Rule 4 of the High Court Rules 1988 – were filed out of the seven- day time allowed under Order 35 Rule 2. At the hearing before him on 21 October 2014, the Master would uphold the preliminary objection and dismiss the application. In deliberating on the point, the issue was whether Order 35 Rule 2 was mandatory so that an application (to set aside a judgment entered at a trial in the absence of a party) filed out of the time stipulated therein must necessarily be dismissed, **OR**, whether the Court retained a discretion to extend the time stipulated therein by application of Order 3 Rule 4.

16. **Order 35 Rule 2** provides that:

> '2.-(1) Any judgment, order or verdict obtained where one party does not appear at the trial maybe set aside by the Court, on the application of that party, on such terms as it thinks just.
> (2) An application under this rule must be made within 7 days after the trial.'[Emphasis provided].

17. **Order 3 Rule 4** provides:

> '4.-(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings. [Emphasis provided].
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

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15. .....at no time did the Petitioner for the Respondent/Plaintiff advise the Appellant/Defendant that it had issued a Demand Notice against the Appellant/Defendant.
16. .....the Appellant/ Defendant corresponded with the Respondent/Plaintiff on the lack of service of a Demand Notice under Section 221 of the Companies Act seeking a withdrawal of the same, but the Respondent/Plaintiff proceeded with its Winding Up Petition.
17. .....the due date for the Appellant/Defendant to file its Summons to fix its Appeal for Hearing was on or about the 15th of December 2014.
18. .....I am informed by Messrs, Fa & Company that the Judicial Vacation commenced on or about this period until about the 15th of January 2015.
19. ..... the Respondent/Plaintiff's Winding Up Petition was called on the 21st of January 2015.
20. .....on the 21st of January 2015, the Appellant/Defendant then proceeded to file a Summons seeking a Stay of the Winding Up Petition, which Summons is already before the Court.
21. ..... the multiple proceedings filed against the Defendant had resulted in the Appellant/Defendant missing its deadlines.
22. .....the Appellant/Defendant is a small Company and does not have the resources to litigate multiple matters at the same time.

CONCLUSION

23. .....the Appellant/Defendant hereby applies for an extension of time to re-file its Notice of Appeal and it's Summons to fix its Notice of Appeal for Hearing.
24. ..... the Appellant/Defendant has good grounds of Appeal which require a consideration by the Court.
25. .....the Appellant/Defendant seeks an Order in terms of its Summons.

(3) The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.'

18. The Master considered **Fiji Development Bank V Crown Cork Fiji Ltd, Alfred Young and Ors** [2012] HBC 96/01L and **Shocked and Another v Goldschmidt and Others**[1990] 1 ALL E.R 372. In **FDB v Crown Cork**, Madam Justice Wickramasinghe said that the **"second opportunity to a defaulting party to have his day in Court"** which Order 35 affords is only available if the time prescribed therein is strictly followed[4].

19. In my view, Wickramasinghe J's reasoning appears to be a little misguided. She treated the time stipulated under Order 35 as if it was a statutory limitation and would, consequently, struggle to find the line where the Court might have a discretion and/or an "inherent power" to extend time (see relevant excerpts from her ruling below):

'[19] I have carefully considered the legislative intention of the Rules. It appears on a plain reading of **O.35** of the High Court Rules that it intended to give a second opportunity to a defaulting party to have his day in court in line with the well-settled principles that all parties must be heard on their cause. However, in doing so I do not think the legislative intended a defaulting party(s) to come before court at their leisure and pleasure.

[20] The word "must" stated in **Order 35 r.2** has the same meaning as "shall". The word "shall" denotes and has been construed as meaning mandatory compliance. In my mind strict procedural compliance is therefore required if a party wishes to enjoy the benefits of **O.35**. The Court could use its inherent powers only if the aggrieved party demonstrates some exceptional circumstances to expand the time. If not, it is my considered view that the courts cannot expand the statutory limitation of time in every case disposed ex parte while exercising inherent jurisdiction of the court or under **O.2 r 3**.

20. If I may say so, the High Court Rules 1988 were made by the Chief Justice in exercise of the powers conferred to him by section 25 of the High Court Act[5] (Cap 13)[6]. They are not a creature of statute. While I accept that, as a

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[4] Wickramasinghe J had said:
'[19] I have carefully considered the legislative intention of the Rules. It appears on a plain reading of O.35 of the High Court Rules that it intended to give a second opportunity to a defaulting party to have his day in court in line with the well-settled principles that all parties must be heard on their cause. However, in doing so I do not think the legislative intended a defaulting party(s) to come before court at their leisure and pleasure.
[20] The word "must" stated in Order 35 r.2 has the same meaning as "shall". The word "shall" denotes and has been construed as meaning mandatory compliance. In my mind strict procedural compliance is therefore required if a party wishes to enjoy the benefits of O.35.

[5] Formerly called the Supreme Court Act.

[6] Section 25 provides:

Power to make rules

25.—(1) In this section "rule" includes any addition to or amendment or revocation of a rule.
(2) It shall be lawful for the Chief Justice to make rules of Court carrying this Act into effect and in particular for all or any of the following matters (that is to say) –

general rule, a Court in applying a statutory provision, cannot exercise a discretion unless the Parliament has conferred it so, it is a grave fundamental mistake to elevate the High Court Rules to the same status as a statute.

21. The case of **Shocked and Another v Goldschmidt** which the Master considered is helpful. I reproduce below a part of the reasoning of Legatt LJ at page 377 which the Master had cited:

> *The cases about setting aside judgments fall into two main categories:*
>
> *(a) Those in which judgment is given in default of appearance or pleadings or discovery and:*
>
> *(b) Those in which judgment is given after a trial, albeit in the absence of the party who later applies to set aside.*
>
> *Different considerations apply to these two categories because in the second unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and an adjudication on the merits has thereupon followed"*
>
> *Jenkins LJ in **Grimshaw v Dunbar** [1953] ALL ER 350 at 355 said:*
>
> > *"...a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross examine his opponent's witnesses and he is entitled to call his own witnesses and give his own evidence before the court. If my mischance or accident a party is shut out from that right and an order is made in his absence then common justice demand so far as it can be given effect to without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to the court and present his case no doubt on suitable terms as to costs..."*

22. The Master then went on to cite a series of propositions of Legatt LJ as guidelines at page 381 in **Shocked and Another v Goldschmidt**:

1. Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.
2. Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.
3. Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.
4. The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

(a) for regulating the sittings of the Supreme Court for the dispatch of civil business therein and of a judge sitting in chambers;
(b) for regulating the pleading, practice and procedure in the Supreme Court in civil cases and in matters which in Her Majesty's High Court of Justice in England come within the jurisdiction of the Crown side of the Queen's Bench Division thereof;
(c) for regulating the hours of opening and closing the offices of the Court)

5. Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment or third parties have acquired rights by reference to it.
6. In considering justice between parties the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.
7. A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.
8. There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

23. Having considered the above, the Master then turned to the circumstances in this case and observed that:

(a) the plaintiff had adduced evidence and that I had determined that the defence had on merit.

(b) the defendant had defaulted previously, on 28 April 2013, when default judgment was entered for failing to file defence but which default judgment was later set aside by consent.

(c) the judgment was a regular judgment.

(d) the application to set aside was filed out of time. The judgment was given on 6 August 2014, whereas the application to set aside was filed on 29 August 2014. The application should have been filed by 13 August 2014.

(e) Order 3 Rule 4 gives power to the Court to extend time even if the application to extend is made after time had expired[7].

(f) the Master then cited and relied on a passage from the English Court of Appeal case of **Mitchell v News Group Newspapers Ltd**[2014] 2 All ER 430;[2013] EWCA Civ 1537 (CA). The case however, was dealing with the English CPR 3.9 which may not be helpful in the interpretation of Order 35 of Fiji's High Court Rules[8].

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[7] As the Master observed at paragraphs [23] to [25] of his Ruling::

[23] The defendant had opportunity to file its application seeking extension of time before expiration of the 7 day time limit, if it had felt that it would be impossible for it to file within 7 days for one reason or the other, because O.3, r. 4 (2) states that, the Court may extend any such period although the application for extension is not made until after the expiration of that period. However, the defendant did not mind to do so.
[24] In this case the defendant seeks extension of time to file its application to set aside after expiration of the 7 day time limit set by O.35, r.2 (2) in the application to set aside the default judgment itself. In other words, the defendant seeks extension of time after filing the application to set aside out of time.
[25] In ANZ Banking Group Limited v Niyaz Mohammed [2011] ABU 28/06 (apf HBC 337/98L) 20 May 2011 at [8] and [33], Marshall, Khan and Calanchini, JJA thought that:

'The rule allows a Court to extend the period within which a person is required to do any act in any proceedings although application for extension is not made until after expiration of a period. By its very nature, application must be made ex parte as there is at that point no other party to proceedings.' [Emphasis added]

[8] The passage which the Master had cited from the above case is as follows:

(g) then, it seems, relying on the strict approach in **Mitchell v News Group**, and also the Fiji Court of Appeal decision in **Australia and New Zealand Banking Group Ltd v Mohammed** [2011] FJCA 31; ABU0028.06 (20 May 2011) - the Master would go on to adopt the same approach as Wickramasinghe J in **Fiji Development Bank V Crown Cork** by elevating Order 35 Rule 2(2) as if it were a statutory stipulation.

> [27] In the case before, the defendant had failed to comply with the mandatory requirement of **O.35, r.2 (2)** in that it should have its application to set aside the judgment given after trial, albeit in the absence of the defendant, within 7 days of the trial date. Seven days deadline is set by the statute. If so, no one is entitled to challenge the deadline is unreasonable. We must presume that the deadline is set with a purpose, perhaps finality and case management in mind. Rules are there to comply with and not to ignore. The need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue.

(h) the Master then concluded:

> **Conclusion**
>
> [28] For the foregoing reasons, I would uphold the preliminary point raise by the plaintiff that the application is filed out of time and should be struck out. The application for extension of time, in my opinion, should have been made, ex parte, before filing the application to set aside the judgment. I am fortified, to say this, with the decision of Fiji Court of Appeal in **ANZ Banking Group Limited v Niyaz Mohammed** (supra). The defendant in the present case failed to seek extension of time before filing the application to set aside the judgment under **O. 35, r. 2** of HCR. The application to set aside the judgment given after trial is filed out of time. I accordingly dismiss and struck out it. I make no order as to cost.
>
> **Final result**
>
> [29] The application filed on 29 August 2014 by the defendant to have set aside the judgment given after trial on 6 August 2014 is time barred.

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[26] In Mitchell v News Group Newspapers Ltd[2014] 2 All ER 430;[2013] EWCA Civ 1537 (CA), Lord Dyson MR, Richards and Elias LLJ held:

> *'The obligation in CPR 3.9 to consider the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and court orders, reflected a deliberate shift in emphasis from the previous wording of CPR 3.9. Those considerations were to be regarded as of paramount importance and given great weight. In practice, in applying the new approach, it would usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If that could properly be regarded as trivial, the court would usually grant relief provided that an application was made promptly. If the non-compliance could not be characterised as trivial, then the burden was on the defaulting party to persuade the court to grant relief. The court would want to consider why the default occurred. If there were a good reason for it, the court would be likely to decide that relief should be granted. Compliance with rules, practice directions and court orders was essential if litigation was to be conducted in an efficient manner; if departures were tolerated, then the relaxed approach to civil litigation, which the reforms had been intended to change, would continue. In the instant case, the master had not misdirected herself in any material respect, nor did she reach a conclusion that had not been open to her. The decision had been robust, but the master had been right to focus on the essential elements of the new regime. The defaults by the claimant had not been minor or trivial and there had been no good excuse for them. They had resulted in an abortive costs budgeting hearing and an adjournment which had serious consequences for other litigants. Accordingly, the appeal would be dismissed (see [36], [39]–[41], [59], below).'*

> Accordingly the application is dismissed and struck out. No order as to costs. Order accordingly.

21. The strict narrower approach of the Master finds support in many other oft cited authorities. However, it is a stark contrast to the approach relied on by Mr. Fa in the following passage from the Supreme Court Practice 1988 (White Book) on the application of Order 3 Rule 4:

> The object of the rule is to give the Court a discretion to extend time with a view to the avoidance of injustice to the parties (**Schafer v Blyth** [1920] 3. K.B. 143; **Saunders v Paxley** (1885) 14 Q. B.D. 234, p.237). "When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought to be listened to and any injury caused by delay may be compensated for by the payment of costs" (per Bramwell L.J. in **Atwood v Chichester** (1878) 3 Q.B.D. 722, C.A.).

22. I am of the view that the applicant does have a chance of success against the Master's ruling if time is extended.

Degree of Prejudice To Respondent

23. The plaintiff has been diligent in the pursuit of its claim. The defendant, on the other hand, has been rather dilatory. It had a default judgment entered against at a much earlier time on account of its failure to file and serve a statement of defence. This was later set aside by consent. Then the default judgment on account of its non-appearance on the trial date. However, I am of the view that the plaintiff may be compensated adequately in costs for its prejudice.

COMMENTS

24. The Master had ruled only on the basis of the preliminary objection rather than on the merit of the application.

> **Determination**
> [12] The preliminary issue that is to be determined by me is that whether the application is to be struck out on the ground that it is filed out of time. In this ruling I will only decide the preliminary issue raised by the plaintiff. I will not decide the merit of the application.

25. Of course, he was not obliged to deal with the merit of the application, but if he had done so, he would have had to consider **Shocked and Another v Goldschmidt** that:

The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

26. I highlight the above merely to say that, similarly, in this ruling, I have not dealt with the question of whether or not there is a real prospect of success in the applicant/defendant's case against the judgment which I had entered in default of its appearance in August 2014.

CONCLUSION

27. I grant Order in Terms of the Application. I award costs in this matter in favour of the Respondent/Plaintiff (Sonaisali Island Resort Limited) which I summarily assess at $1,500 (one thousand five hundred dollars only).

28. For the avoidance of doubt, the judgment that I entered on 06 August 2014 remains intact until it is properly set aside.

.....

Anare Tuilevuka
JUDGE
07 October 2016