IN THE HIGH COURT OF FIJI

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 358/ 2002L

On an appeal from the Decision of M H Mohamed Ajmeer J delivered on 19th January 2016 at the High Court at Lautoka in Civil Action HBC No. 358 of 2002

BETWEEN : **PRIYADARSHANI NAIDU** (an infant) by her tutor (**SARWAN KUMAR)** of 2/22 Helen Street, Westmead, New South Wales, Australia.

APPLICANT
(ORIGINAL PLAINTIFF)

A N D : **THE MEDICAL SUPERINTENDENT OF LAUTOKA HOSPITAL,** Hospital Road, Lautoka.

FIRST RESPONDENT
(ORIGINAL FIRST DEFENDANT)

A N D : **THE MEDICAL SUPERINTENDENT OF THE COLONIAL WAR MEMORIAL HOSPITAL,** Waimanu Road, Suva.

SECOND RESPONENT
(ORIGINAL SECOND DEFENDANT)

A N D : **THE CHIEF EXECUTIVE OFFICER FOR HEALTH** as executive representative of the **MINISTRY OF HEALTH** in right of the **REPUBLIC OF THE FIJI ISLANDS** Dinem House, 88 Amy Street, Toorak, Suva.

THIRD RESPONDENT
(ORIGINAL THIRD DEFENDANT)

A N D : **THE ATTORNEY GENERAL OF THE REPUBLIC OF THE FIJI ISLANDS,** Suvavou House, Victoria Parade, Suva.

FOURTH RESPONDENT
(ORIGINAL FOURTH DEFENDANT)

Appearances : Ms S. Veitokiyaki for plaintiff/applicant

Mr J. Mainavolau for defendants/respondents

Date of Hearing : 16 February 2017

Date of Ruling : 21 March 2017

R U L I N G

Introduction

[01] This is an application for leave to appeal an interlocutory order.

[02] By summons dated 10 February 2016 and filed on 09 February 2016 ('the application') the plaintiff seeks leave to appeal the interlocutory order delivered by this court [my order] on 19 January 2016, whereby the court dismissed the plaintiff's claim refusing to adjourn the hearing to another day. Basically, the action was dismissed on the basis that on the day fixed for hearing of the matter, the plaintiff defaulted in appearance and failed to offer any evidence in support of the claim.

[03] The application is supported by an affidavit of Krishneel Kunal Kumar, Litigation Clerk employed by Messrs Pillai Naidu & Associates, the solicitors for the plaintiff. It will be noted that the plaintiff is unable to swear even an affidavit in support of the application filed on her behalf.

[04] The plaintiff seeks leave to appeal in pursuance of section 12 (2) (f) of the Court of Appeal Act, which so far as relevant provides:

> *"(2)* ***No appeal*** *shall lie-*
>
> *(f)* ***without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge*** *of the Supreme Court (now, the High Court), except in the following cases, namely:-*
>
> *(i) where the liberty of the subject or the custody of infants is concerned;*
>
> *(ii) where an injunction or the appointment of a receiver is granted or refused;*
>
> *(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer*

under the Companies Actin respect of misfeasance or otherwise; (Cap. 247.)

(iv) in the case of a decree nisi in a matrimonial cause or judgment or order in an Admiralty action determining liability;

(v) in such other cases as may be prescribed by rules of Court. (Emphasis provided)

[05] The defendants filed an affidavit of John Pickering in opposition.

Grounds of Appeal

[06] The proposed grounds of appeal are as follows:-

i. ***THAT*** *the Learned Judge erred in law and in fact in dismissing the Application for Adjournment despite the Motion and Affidavit filed by the Counsel for the Plaintiffs which contained clear and cogent grounds as to vacation of the hearing date.*

ii. ***THAT*** *the Learned Judge erred in law and in fact in taking into consideration irrelevant matters and facts which were not available to him in refusing the Application for adjournment.*

iii. ***THAT*** *the Learned Judge erred in law and in fact in failing to have regard to the fact that the defendants Counsel had been informed of the vacation of the trial date and had consented to the same and was not herself present but was represented by another Counsel for the purpose of adjournment.*

iv. ***THAT*** *the Learned Judge erred in law and in fact in non-suiting the action and awarding costs of $2,000.00 to the Defendants.*

v. ***THAT*** *the Learned Judge erred in law and in fact in holding that the Plaintiffs witnesses were not available or that the Counsel for the Plaintiff was feigning sickness and was guilty of obtaining continuous adjournments to avoid trial when such was not the case.*

The Background

[07] In November 2002, the plaintiff issued a writ of summons against the defendants seeking damages arising out of medical negligence. Eventually, after numerous adjournments upon the requests of the plaintiff and few occasions by the defendants, the substantive matter was set down for hearing (trial) on 19 January 2016 when neither the plaintiff nor her solicitor appeared in court. However, Mr Saimoni Nacolawa on instructions from Messrs Pillai Naidu and Associates, the plaintiff's solicitors appeared for the limited purpose of making application to adjourn the hearing. He clearly informed the court that he had no instructions to proceed with the hearing in the event the application for adjournment is refused. Mr Pickering appeared for the defendants. Mr Nacolawa, on behalf of the plaintiff, sought for an adjournment of the hearing, which the court refused. The court asked Mr Nacolawa, counsel appearing for the plaintiff whether the plaintiff is ready to proceed with the trial. Then, replied he has no instructions. Thereafter, by its order dated 19 January 2016, the court dismissed the claim with costs summarily assessed at $2,000.00. It is this order the plaintiff seeks leave to appeal.

Test for granting leave

[08] Our legislations do not provide the criteria to be considered in an application for leave to appeal. Section 12 of the Court of Appeal Act states when the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge to the Court of Appeal is needed.

[09] An application for leave to appeal could be made to either the court below or to the Court of Appeal. However, it must in first instance be made to the court below: Court of Appeal Rules 26 (3).

[10] As regards to the test for granting leave to appeal an interlocutory order or judgment, we need to look at the case authorities. In ***Bank of Hawaii v Reynolds*** [1998] FJHC 226, referring to ***Ex Parte Bucknell*** [1936], Pathik, J. held that:

> *'At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt on exhaustive statement of the considerate which should be regarded as a justification for granting Leave to Appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment'*

The Court in Ex parte Bucknell went on to state at page 225:

> *But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success of the proposed appeal.'*

[11] Also, in ***Totis Inc. Sport (Fiji) Ltd & Another v John Leonard Clark & Another,*** FCA No. 35 of 1996 Hon. Justice Tikaram expressed similar sentiment as follows:

> *'It has been long settled law and practice that the interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeal 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'*

[12] Lord Woolf MR said in ***Swain v Hillman*** [2001]1 All ER 91 that:

> *"A **'real' prospect of success means** that prospect of success must be realistic rather than fanciful. The court considering a request for*

permission is not required to analyse whether the proposed grounds of appeal will succeed, but ***merely there is a real prospect of success*** *(**Hunt v Peasegood** (2000) The Times, 20 October 2000). [Emphasis provided]*

Discussion and Conclusion

[13] The plaintiff seeks leave of the court to appeal an interlocutory order delivered refusing an application made on behalf of the plaintiff to adjourn the hearing to another date. When refusing the application to adjourn, the court in paras 3, 4 and 9 of the ruling stated that:

"...

3. *Last occasion also, the plaintiff was not ready to proceed with the trial as the plaintiff as well as witnesses are away overseas. Then the court granted adjournment with reluctance with cost to the Defendants to be paid in the cause.*

4. *When obtaining adjournment last time the plaintiff sought leave of the court to file affidavit evidence in chief of the plaintiff and the witnesses who are residing in Australia and stated that witnesses will be available for cross examination via Skype, if necessary. The court granted that application. However, the plaintiff never filed any affidavit evidence of the witnesses as ordered by the court. There has been non-compliance on the part of the plaintiff with the direction of the court.*

9. *I cannot satisfy myself with the medical report tendered on behalf of Mr Naidu as it appears to have been obtained for the purpose of seeking an adjournment of today's hearing. Further, the medical report does not state that Mr Naidu has been hospitalized. I therefore reject the medical receipt and refuse to vacate the trial to adjourn the matter to another date. Too many cases pending in court awaiting trial date. The court will not grant adjournment as a matter of course. The court may grant adjournment of trial or hearing, if cogent reason were adduced by a party.*

..."

[14] The application for leave to appeal is made on the basis the order refusing an application to adjourn the hearing is an interlocutor. An order refusing an application may be considered as an interlocutory order and therefore leave is necessary to appeal that order.

[15] The court has discretion to adjourn a trial in the interest of justice. This discretion derives from Order 35, r.5 of the High Court Rules 1988 ('*HCR*'), which states:

> *"3.* ***The Judge may****, if he thinks it expedient* ***in the interest of Justice, adjourn a trial*** *for such time, and to such place and upon such terms, if any, as he thinks fit"* (Emphasis provided)

[16] In the affidavit in opposition the defendants state that the continuous granting the plaintiff time to reset the trial dates is greatly prejudicing the defendants in defending the matter.

[17] On the principles governing adjournment of a hearing, in **Decker v Hopcraft** [2015] EWHC 1170 (QB), Mr Justice Warby in paras 21 to 24 states:

> *"...*
>
> *21. The decision whether to adjourn a hearing, and the decision whether to proceed with a hearing in the absence of a party, are both case management decisions. The court is required to exercise a discretion, in accordance with the overriding, objective, in the light of the particular circumstances of the individual case. The authorities provide valuable guidance, however.*
>
> *22. A court faced with an application to adjourn on medical grounds made for the first time by litigant in person should be hesitant to refuse the applicant. (Fox v Graham Group Ltd, The Times, 3 August 2001 per Neuberger J, as he then was). This, however, is subject to number of qualifications. I focus on those which seem to be of particular relevance in the present case.*

23. First, the decision is always one for the court to make, and not one that can be forced upon it. As Norris J observed in ***Levy v Ellis-Carr*** *[2012] EWHC 63 at [32];*

> *"Registrars, Masters and district judges are daily faced with cases coming on for hearing in which one arty either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to be court simply to state that they will not be attending. Not infrequently "medical" grounds are advances, often connected with the stress of litigation. Parties who think that they thereby compel the Court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken, the decision whether or not to adjourn remains one for the judge."*

24. Secondly, the court must scrutinize carefully the evidence relied on in support of the application. In Levy v Ellis-Carr at [36] Norris J said this of the evidence that is required:-

> *"Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expresses is an independent opinion after a proper examination. If is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)"*
>
> *..."*

[18] Fiji Court of Appeal, in ***Goldenwest Enterprises Ltd v Pautogo*** [2008] FJCA 3; ABU0038.2005 (3 March 2008), sets out the adjournment and the law as follows:

"**29. ADJOURNMENT & THE LAW**

It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. It is further universally accepted that an appeals court should be loath to overturn the trial court's exercise of discretion as to be grant of an adjournment or its refusal, except upon good reason. This principal is states in various ways, each nonetheless confirming it:

A trial court's decision on request for adjournment will not be reserved absent a clear showing that the trial court erroneously exercised its discretion: ***State v Elliot****, 203 Wis 2d 95, at 106; 551 NW 2d 859, at 854 (Ct. App.) (1996);* ***Re Joshua GH, A Person Under the Age of 18****, Wis. Ct Apps, Dst 1, No. 99-1357 (1999)*

The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be sown that the discretion was improperly exercised it should not be disturbed. ***Go Pak Hoong Tractor and building Construction v. Syarikat Pasir Perdana*** *(1982) 1 MLJ77;* ***Ayer Molek Rubber Company Berhad (1292-P) v. Mirra SDN BHD (153829-A)*** *(2007) (Company Winding-up No: D2-28-14-2006) High Court of Malaysia at Kuala Lumpur, 12 December 2007).*

... adjournment of cases fixed for hearing are not obtainable as a matter of course but may be granted or refused at the discretion of the court... The exercise of this discretion, however, is a judicial act against which an aggrieved party may lodge an appeal, but since it is a matter of discretion, an appellate court will be slow to interfere with it. It would however, appear that in order to succeed in an appeal against such exercise of discretion, the appellant shall satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant: ***Okeke v Oruh*** *(1999) 6 NWLR (Pt 606) 175, at 188;* ***Unilag v Aigoro*** *(1985) 1 NWLR (Pt1) 143;* ***Alsthom v Saraki*** *(2005) 1 SC (Pt 1) 1; Caekey Traders Ltd v Gen. Motors Co Ltd (1992) 2 NWLR (Pt*

222) 132; George v George (2001) 1 NWLR (Pt 694) 349; ***Nigerian Telecommunications PLC v Chief SJ Mayaki*** *Ct App. Lagos, 2006 (12 April 2006), at 6*

This Court is well aware that it must be very slow to interfere with the discretion of the trial judge on such a question as an ***adjournment*** *of a trial or as in this case the refusal to grant one. It will only do so in very exceptional circumstances where it appears that the result of the order to refuse the adjournment would be to defeat the rights of the affected party altogether and to cause an injustice to one or other of the parties:* ***Sookdeo v Ali*** *Ct App. Rep. Trinidad & Tobago, 2001 (18 May 2001), at 2*

[19] In the present case, the plaintiff intends to appeal the order made refusing to adjourn the trial on the ground among others that application was refused despite there were cogent reasons to adjourn and the application was not opposed by the defendants.

[20] When making the application for adjournment, Mr Nacolawa who appeared for the plaintiff tendered a medical report in proof of the illness of the plaintiff's solicitor on record (Mr D S Naidu). The court disregarded the medical report stating that the Medical Report submitted today for Mr Naidu does not suggest that he is unfit and unable to appear in court but it recommends 3 days' rest for Mr Naidu (see: para 7 of the Ruling).

[21] The medical report tendered in support of the application to adjourn the hearing does not give details of medical attendant's familiarity with the patient's medical condition (detailing all recent consultations) and it does not identify with particularity what the patient's medical condition is and the feature of that condition which (in the medical practitioner's opinion) prevent participation in the trial process. The medical report simply recommends 3 days' rest for the patient and nothing else. As stated in Decker's case (above), no judge is bound to accept expert evidence: even a proper medical report falls to be

considered simply as part of material as a whole (including the previous conduct of the case).

[22] The plaintiff and her witnesses are away overseas: perhaps they have migrated. As such, the plaintiff's solicitor sought their evidence to be taken by way of affidavit evidence. The court granted that application subject to the condition that the witnesses must be available for cross examination via Skype. The plaintiff, albeit obtained many a date for that purpose, did nothing until the dismissal of the action. The court considered the previous conduct of the case and the fact that the action was instituted in 2002.

[23] It is immaterial whether or not the opposite party consents the application to adjourn. The decision whether or not to adjourn remains one for the judge.

Conclusion

[24] The plaintiff seeks leave to appeal an order refusing to adjourn the trial. This is an order delivered in the exercise of the court's discretion to adjourn the trial in the interest of justice. The door of justice was open for the plaintiff since the institution of the action in 2002 and until dismissal of the action: about 14 years. The plaintiff has failed to make use of this opportunity. The plaintiff could not even swear an affidavit in support of this application. She has filed an affidavit of the law clerk employed by her solicitors in support of her leave application. The plaintiff's affidavit does not state when she and her witnesses will be available for the trial if leave is granted and her appeal succeeds.

[25] There is some reluctance in giving leave to appeal against case management decisions. A decision to refuse to adjourn the trial is a case management decision. I do not see that there is any compelling or special reason why the appeal should be heard. Further, I do not consider that the appeal would have real prospect of success on the

proposed grounds of appeal if leave is granted. The appeal court would be reluctant to upset a discretionary decision. I would, therefore, refuse to grant leave to appeal the interlocutory order delivered on 19 January 2016 refusing to adjourn the trial with no order as to costs.

The Outcome

1. Leave to appeal refused.
2. No order as to costs.

21/3/17

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M H Mohamed Ajmeer

JUDGE

At Lautoka

21 March 2017