IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL APPEAL NO. HBA 001 of 2010

BETWEEN : **MISHRA PRAKASH & ASSOCIATES** a firm of solicitors having its offices in Ba, Lautoka and Suva.

Appellant

A N D : **NAGAN ENGINEERING (FIJI) LTD** a limited liability company having its registered office at Old Kings Road, Yalalevu, Ba.

First Respondent

AND : **LEAH LOUISE NAGAN** of Old Kings Road, Yalalevu, Ba, Company Director.

Second Respondent

Counsel : **(Ms) Natasha Feroz Khan for the Appellant**
(Ms) Virisila Qolisaya Lidise for the Respondents

Date of Ruling ; Monday, 19th March 2018.

RULING

(A) INTRODUCTION

(1) This is an application filed by the appellant seeking the following Orders;

1. *The time for making an application for leave to appeal be extended.*
2. *Leave be granted to appeal.*

3. *Leave be given to amend the appeal so that the present grounds state the precise form of the order which is sought in place of the judgment of the Master.*

4. *Time for service be extended accordingly.*

5. *The court do give further directions and Grounds of Appeal filed on the 25th day of February 2010 be set down for hearing.*

(2) The application is made by Summons dated 27th July 2010 and is supported by an affidavit sworn on 21st July 2010 by *'Richard Sudhir Prakash'*. In the body of the Affidavit the deponent states that he is the Chief Clerk in the office of 'Mishra Prakash & Associates' (the Appellant).

The application was vigorously opposed. An answering Affidavit sworn on 04th August 2010 by the Second Respondent was filed on behalf of the Respondents. The Appellant and the Respondents filed written submissions prior to the hearing of the application before Hon. Justice Sapuvida.

(B) BACKGROUND

(1) This is a two-fold application, first for extension of time to make an application for leave to appeal, and secondly for leave to appeal. In this case an interlocutory order was made by the Master on 18th day of February 2010.

(2) The Appellant, Mishra Prakash & Associates (the 4th Defendant) had applied to strike out the Statement of Claim against it. The Master rejected that application and made the following orders in his ruling.

(i) the issue of whether or not the claim is statute barred under Section 4 of the Limitation Act (Cap 35) is reserved for the substantive trial.

(ii) whether Mishra Prakash & Associates (4th Defendant)has or had at any time at all exposed itself in a conflict if interest situation or was ever in breach of its fiduciary duty or duties to the plaintiffs as alleged in paragraph 7 of the statement of claim – is reserved for the substantive trial.

(iii) the application to strike out on the ground that the Plaintiffs are estopped by the doctrine of res-judicata from pleading conflict of interest as a cause of action – is dismissed.

(iv) I reserve the issue of whether the claim against Mishra Prakash & Associates is a totally separate cause of action from that against the other defendants to 29th March 2010 at 10,00 am to be dealt with together with the application for consolidation.

(3) The Appellant had exhausted the period of time allowed to file an application for leave to Appeal against an interlocutory order. The summons is about four (04) months and twenty four (24) days out of time for leave to appeal against an interlocutory order. The reasons for it are put forward in an affidavit of 'Richard Sudhir Prakash' the chief Clerk in the office of 'Mishra Prakash & Associates' (the Appellant)

(4) What is the story behind these proceedings?

I therefore turn to the facts of this case. I take them gratefully from the admirably clear and succinct statement to be found in the interlocutory Order of the Master;

(1) The 1st Plaintiff company, Nagan Engineering (Fiji) Limited ("NE (Fiji) Ltd") was incorporated in the mid-1960s. It was founded by the 2nd Plaintiff's late husband. When he passed on, the 2nd Plaintiff, Mrs Leah Loiuse Nagan (Mrs. Nagan), took over the reins of NE (Fiji) Ltd.

(2) At some point in time, the 1st Defendant (Neel Hem Raj) became involved in NE (Fiji) Ltd and 1000 shares were to be issued to him, allegedly on the advice of the 4th Defendant.

(3) On 31st October 1995, Mrs Nagan and Hem Raj wrote an instruction to Mishra Prakash & Associates to incorporate a new company. According to that instruction, Mrs. Nagan and Hem Raj were to share directorship and shareholding equally.

(4) On the 13th November 1996, Mishra Prakash & Associates gave various legal advice to Mrs. Nagan vide a letter dated the same day. Included in that letter was an advice to NE (Fiji) Ltd to transfer Certificate of Title No 12538 ("land") registered in its name to a new entity. Mishra Prakash & Associates then advised the Plaintiffs to set up a new entity so it can hold CT No. 12538. The purpose of that advice apparently was to keep the land out of any potential FDB creditor action. Acting on that advice, the Plaintiffs then instructed Mishra Prakash to transfer CT 12538 to Nagan Ferroalloys (Fiji) Limited ("NFFL") the 3rd Defendant Company. As it turns out, NFFL was incorporated as a result of Mrs. Nagan's and Hem Raj's instructions of 31st October instruction.

(5) The Plaintiffs say that Mishra Prakash & Associates failed to warn them of the risks they would be exposed to if NFFL does not hold the land on trust for NE (Fiji) Ltd. They further say that Mishra Prakash & Associates, at about the same time, was receiving certain instructions from Hem Raj to issue an additional share in NFFL to his wife Nirmala Devi Raj, which advice Mishra Prakash & Associates later acted upon.

(6) It is alleged that Mishra Prakash & Associates failed to disclose the said Hem Raj instructions to Mrs Nagan. It is claimed that the former should have done so as it potentially undermined her position in NFFL which ultimately put NE (Fiji) Ltd at risk. The statement of claim pleads that Mishra Prakash & Associates either withheld that instruction deliberately from NE (Fiji) Ltd and

Mrs. Nagan or negligently failed to disclose it to them. According to the pleadings, had Mishra Prakash & Associates informed the Plaintiffs about Hem Raj's instruction (or the change in the shareholding structure that results from it), it would have put NE (Fiji) Ltd off from transferring CT 12538 to NFFL.

(7) *As it turns out, some eleven or twelve years after NE (Fiji) Ltd transferred the land to NFFL, the latter filed a Writ and Statement of Claim in Lautoka Civill Action 251 of 2008 on a cause of action, which, to put it quite simply, is premised on an assertion of its lawful right as registered proprietor of CT 12538. The Defendants in that case are NE (Fiji) Ltd. Mrs. Nagan and Mrs. Nagan's son who has replaced Hem Raj as Managing Director in NE (Fiji) Ltd.*

(8) *The substantive dispute in 251 of 2008 is still pending in Court. In that case NFFL is seeking judgment against NE (Fiji) Ltd and Mrs. Nagan for unpaid rental of close to $100,000 to date on an apartment and storage space they use on CT 12538. In the Statement of Claim, NFFL also seeks an order that NE (Fiji) Ltd and Mrs. Nagan be restrained from trespassing on the land or from interfering with NFFL or from removing equipment or machinery in any way. An Order is also sought that NE (Fiji) Ltd and Mrs. Nagan returns NFFL's equipment and pay damages done to the property and that Mrs. Nagan's shareholding in NE (Fiji) Ltd be appropriated and cancelled to satisfy damages.*

(C) JURISDICTION

Against that factual background, I now turn to the applicable law. The Order 59 of the High Court Rules, 1988 sets out the procedure in respect of appeals from the decisions of the Master.

"Rule 8 – Appeal from Master's decision

(1) *An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.*

(2) *No appeal shall lie from an interlocutory order or judgment of the Master to a single Judge of the High Court without leave of a single Judge of the High Court which may be granted or refused upon the papers filed.*

Rule 9 – Time for Appealing

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 the delivery of an order or judgment or*

(b) *In the case of an interlocutory order or judgment, within 7 days from the date of*

granting of leave to appeal."

Rule 11 – Application for Leave to Appeal

Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit filed and served within 14 days of the order or a judgment.

Rule 10 – Extension of Time

(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 inter-parte summons supported by an affidavit."

(D) PRINCIPLES TO BE APPLIED

Against that background, it is necessary to turn to the judicial thinking in relation to the principles governing the exercise of the discretion to make the order the Appellant now seeks. As noted, this is an application to extend the time to make an application for Leave to appeal. Whether or not to extend the time is essentially discretionary. The discretion of the Court, as I conceive it, a perfectly free one, the only question is whether, upon the facts of the present case, whether the discretion should be exercised.

Commenting on the discretion, Lord Donaldson of Lymington in **"Norwich and Peterborough Society v Steed" (1991) 2 All.E.R 880** said;

"Once the time for appealing has elapsed, the Respondent who was successful in the court below is entitled to regard the Order/Judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would- be appellant. The classic statement of the elements of this equation is to be found in the judgment of ***Griffiths L J in C M Van Stillevoldt BV V EL Carriers Inc (1983)(1)ALL.E.R 699, (1983) (I) W.L.R 207****, which are set out in the Supreme Court Practice 1991 VOL 1, para 59/4/4 and are, as Mc-cowan LJ set them out, namely;*

- *The length of the delay*
- *The reasons for the delay*
- *The chances of the appeal succeeding if an extension of time is granted*

- *The degree of prejudice to the Respondent if the application is granted."*

See too * **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund**
[2010] FJCA 3

* **Kumar v Commissioner of Police**
Fiji Court of Appeal Civil Appeal No: ABU 0059 of 2014

* **Nair v Prakash**
(2013) FJCA 147

* **Tora v Housing Authority**
(2002) FJCA 16

* **A.G. v Sharma**

(ABU 0041 935) FJCA

(E) ANALYSIS

1. Before passing to the substance of the Appellant's Summons for extension of time to make an application for leave to appeal and for leave to appeal, let me record that Counsel for the Appellant and Respondents in their Written Submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

   I interpose to mention that I have given my mind to the oral submissions made by Counsel before Hon. Justice Sapuvida as well as to the Written Submissions and the judicial authorities referred to therein.

2. Now let me proceed to examine the Appellant's Summons for extension of time to make an application for leave to appeal and for leave to appeal.

3. The Summons stated that *"the application is made pursuant to Order 59, Rule 7 and 8 of the High Court Rules, 1988 as amended, and the inherent jurisdiction of this Court"*. This is a Summons taken out by the Appellant seeking an extension of time to make an application for leave to appeal against the decision of the Master. I state with conviction that the application does raise an initial issue of jurisdiction. It is rather startling that at the hearing before the Court, the

Respondents did not take an objection to the issue of Summons under Order 59, rule 7 and Order 59, rule 8. Nevertheless, it is desirable to have a close look at Order 59, rule 7 and 8.

Order 59, r.7 provides;

References (O.59, r.7)

For the purposes of any cause or matter over which power, authority and jurisdiction is conferred upon the Master in relation to such cause or matter reference to a judge or the Registrar under these Rules shall be deemed to be a reference to the Master.

Order 59, r.8 provides;

Appeal from Master's decision (O.59, r.8)

8. (1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.

(2) No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.

As I said earlier, this is a Summons taken out by the Appellant seeking an extension of time to make an application for leave to appeal against the decision of the Master made on 18th February, 2010. As noted, the Appellant, "Mishra Prakash & Associates (the 4th Defendant) had applied to strike out the Statement of Claim against it in terms of Order 18, rule 18 of the High Court Rules, 1988. The Master dismissed the application and allowed the action against the Appellant to remain. Since the decision of the Fiji Court of Appeal in ***Goundar v Minister for Health*** *(unreported ABU75 OF 2006, 09 July 2008),* there can be no doubt that the Master's decision was an Interlocutory Judgment. The Appellant, being unhappy with the Master's Order sought to challenge the decision.

The first thing to note in the Appellant's application is that there is no jurisdiction vested in this Court to grant an extension of time to make an application for leave to appeal against an interlocutory decision, under Order 59 rule 7 or Order 59, rule 8.

I cannot, for my part, find a specific rule in the High Court Rules, 1988, which makes specific provision for an extension of time for leave to appeal against an interlocutory decision of the Master. Neither counsel in this court argued in express terms, or even implicitly, that there exists a specific provision for an extension of time for leave to appeal against an interlocutory decision of the Master.

Then, what is the fate of this application?

Putting the matter shortly at this stage, it is the general provision contained in Order 3, rule 4 of the High Court Rules 1988, which should be relied on for the Summons seeking an extension of time for leave to appeal against an interlocutory decision of the Master. Only two authorities need be cited on this legal point. They are;

* **Costerfield Ltd v Denarau International Ltd & Others**
  Civil Action No.: 214 of 2012 (07-02-2018)

* **Veilave v Naicker**
  (2017) FJHC 131, HBC 159.2013

For the sake of completeness, Order 3, rule 4 is reproduced below in full.

Order 3, rule 4 of the High Court Rules, 1988 provides;

Extension, etc., of time *(O.3, r.4)*

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 authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(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.

(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.

Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.

I will pause here to consider the principle underlying the exercise of the courts discretion when an extension of time is sought under Order 3, rule 4 (Order 3, rule 5 in U.K).

The following passage of "Bingham" M.R in **"Costellow v Somerset"** (1993) (1) ALL.E.R. 952 at 960 is illuminating;

> *'We ore told thot there is some uncertainty omong proctitioners and judges as to the appropriate proctice in situations such os this. It is plainly desiroble thot we should give such guidonce os we can. As so often happens, this problem arises at the intersection of two principles, eoch in itself solutary.* ***The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The***

prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution. The ***second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.*** *This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.* ***Neither of these principles is absolute.*** *If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule.* ***The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb.*** *A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as Hytrac Conveyors Ltd v Conveyors International Ltd [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.'*

In "**Mortgage Corp Ltd v Sandres** (1996) TLR 751, the Court laid down the general guideline as follows;

'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with

reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the porties to the litigation. 4 In oddition the vocation or adjournment of the date of trial prejudiced other litigonts and disrupted the administrotion of justice. 5 Extensions of time which involved the vocotion or odjournment of triol dotes should therefore be gronted only os o lost resort. 6 Where time limits had not been complied with the porties should co-operote in reaching on ogreement os to new time limits which would not involve the dote of trial being postponed. 7 If they reached such on ogreement they could ordinorily expect the court to give effect to thot ogreement ot the trial ond it wos not necessory to moke o seporote opplicotion solely for thot purpose. 8 The court would not look with fovour on o porty who sought only to toke tactico! odvontoge from the foilure of onother porty to comply with time limits. 9 In the obsence of on ogreement os to o new timetoble, on opplicotion should be mode promptly to the court for directions. 10 In considering whether to gront on extension of time to o porty who wos in defoult, the court would look ot oll the circumstonces of the cose including the considerotions identified obove.'

As I understand the authorities, the grant of an extension of time under this rule is not automatic. The object of the rule is to (as I understand the rule), ensure that those rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties.

4. This matter does require a close and detailed examination of the sufficiency of the supporting affidavit. The Appellant's Summons dated 27th July, 2010 is supported by an Affidavit sworn on 21st July, 2010 by Richard Sudhir Prakash. In the body of the Affidavit the deponent states that he is the chief clerk in the Office of "Mishra Prakash & Associate" (the 4th Defendant and the Appellant). At the hearing before the Court, the Respondents did not take an objection to the admissibility of the Affidavit of the law clerk. But the following extract taken from page 5 of the Supplementary submissions by the Respondents is pertinent;

(i) *It is relevant to note that the Applicant only caused affidavit evidence to be led by a law clerk and not the Solicitor who was charged with the responsibility during the relevant time when leave to appeal should have been filed.*

There is considerable force in that proposition.

I should add that most unfortunately this contention apparently either was not raised or was not pressed before Justice Sapuvida. It seems to have been rather lost sight of.

It is trite law that a lawyer's clerk may not affirm an affidavit intended to be used in a contentious matter in Court. This is indeed a contentious matter where the Respondents are strongly resisting the application for extension of time. The Affidavit should have been affirmed by the Solicitor having personal knowledge of the pertinent matters. More precisely, the deponent should have been the Solicitor who had the conduct and the management of the cause.

What is more, the law clerk deposes "*I am duly authorized to swear this Affidavit on behalf of the Appellant*".

I note that the law clerk has no written authorization to affirm the Affidavit. I cannot comprehend the basis on which he was deposing.

In paragraph 10 of the Affidavit the deponent says, *"The Appellant verily believes there is merit in the Grounds of Appeal on the basis of the Limitation Act"*.

In my view this is insufficient. However, the Respondents did not take an objection to the sufficiency of the Affidavit. The ordinary form of Affidavit is that the Defendant has "a good defence to his action on the merits". Where it is made by the party the words, "as he is advised and believes" are added; where by the Attorney or Managing clerk to the Attorney, the form is "as he is informed and verily believes".

Leave aside for the moment the defects in the Appellant's Summons and the supporting affidavit.

Let me now turn to the matters which this Court takes into account in deciding whether to grant an extension of time.

5. Dealing first with the **length of the delay;**

(a) The Appellant's application to strike out the Respondents Statement of Claim in Civil Action No. 106 of 2009 was heard by the Master and a decision was delivered by the Master on 18th February, 2010. The Master dismissed the application. Thus, the time for filing for application for leave to appeal expired two (02) weeks thereafter, that is to say on or about 03rd March, 2010.

(b) The Appellants Summons for extension of time to make an application for leave to appeal was sprung on the Respondents on 27th July, 2010.

(c) Turning to the period of delay, it is, at least four (04) months and 24 days, which, on any view of it is substantial. The length of the delay is very much long and is not excusable. I cannot shut my eyes to the fact that I am dealing with a matter of months and weeks, not days. The Court should not wear blinkers. These delays cause great hardships, amounting to very real injustice to the Respondents. Under the system that exists at the moment, how in the world could the Respondents know whether there is any possibility of an appeal? I find it hard to believe that this Court should be powerless to intervene to prevent such a manifest injustice.

6. Turning to the second issue, that is **the reason for the failure to file within time,** the reasons for it are put forward in an Affidavit of Mr. Richard Sudhir Prakash, the chief clerk in the Office of 'Mishra Prakash & Associates. (The Appellant and the 4th Defendant) sworn in support of this application on 21st July 2010. He says;

(i) *A Summons for Leave to Appeal had been drafted but there was some difficulty in getting papers issued. A copy of our letter of 8th March, 2010 is annexed hereto and marked with the letter "C".*

(ii) *This letter was done by a staff member who is not with us and certain work was done by Ms. Marleen Prasad an Associate with Mishra Prakash & Associates who has now migrated.*

(iii) *Fresh set of documents for Summons for leave was not filed by us. Therefore this application for leave to appeal is made.*

(iv) *Grounds of Appeal were issued and have been served on Young & Associates.*

The important point which concerns me is whether there is a reasonable explanation as to why there has been the delay which necessitated this application?

I confess to a feeling of some bewilderment at the Appellant's explanation as to why there has been the delay which necessitated this application.

Counsel for the Respondents criticized the reasons in these words; (Reference is made to Written Submissions of the Respondents filed on 29th February, 2012).

(i) *It is submitted that the Intended Appellant's Affidavit in Support does not disclose any reasons for the delay beyond the reliance he placed in respect of a letter sent to the High Court Registry dated the 8th of March, 2010.*

The Respondent's Position

(ii) *It is respectfully submitted that the application for enlargement of time be refused as the Intended Appellant has not provided reasons that would to justify the delay of 4 months and 24 days.*

(iii) *The Intended Appellant is a senior legal practitioner and a result of his experience has the requisite knowledge and resources to determine the proper procedure for appealing interlocutory decisions.*

(iv) *The Intended Appellant submits that the delay was minimal and relies on the filing of his Grounds of Appeal within 7 days of the delivery of the Master's judgment which was incorrectly accepted for filing by the Registry and is also an incorrect interpretation of Rule 9(b) of the High Court Rules. Rule 9(b) states that the Petition of Appeal is to be filed 7 days* ***from the granting of leave to appeal.*** *As leave has not been granted, no merit ought to be placed in the submissions relating to the filing of the Grounds of Appeal within 7 days.*

Reference is made to Supplementary Submissions by Respondents filed on 22nd February, 2018.

(v) *RSP's affidavit purports to explain the delay by annexing a letter dated 8th March, 2010 where it says that "our Grounds of Appeal which was lodged with your registry on 26th February, 2010". Now it is obvious that the Solicitors were mistaken that they could lodge grounds of appeal against a interlocutory judgment without leave first being obtained pursuant to Order 59 Rule 11 which states that a Summons with a supporting Affidavit "is to be filed and served within 14 days of delivery of the order or judgment". It is only after when leave is granted that grounds of appeal can be filed. [See Order 59, Rule 9(b)]. The letter of 8th March, 2010 has sought to cast responsibility on the court registry in delaying the issue of the grounds of appeal. The Solicitors have not come out and accepted responsibility that they were in error themselves in filing an incorrect document and failing to filing an application for leave in time.*

There were no counter submissions made by Counsel for the Appellant.

The submission is correct. I emphatically agree with the submissions made by Counsel for the Respondents.

On a fair and a reasonable reading of the Affidavit of Mr "Richard Sudhir Prakash", it seems to me that the delay was due to a mistaken belief as to the correct legal position by the Appellant's Solicitor. I am bound to say that this is most unsatisfactory. How can a qualified and a Senior Barrister misunderstand the proper procedure for appealing against interlocutory decisions? How can a Senior Barrister misconstrue or misread the rules relating to the filing of documents relating to appeals and leave to appeals? The Appellant's Solicitors were mistaken that they could lodge grounds of appeal against an interlocutory judgment without leave first being obtained. They were plainly wrong. Just to make the matter complete, the letter dated 08th March, 2010 has sought to cast responsibility on the Court registry in delaying the issue of the grounds of appeal. That way of putting the matter, tends, with respect, to look at the issue from the wrong end. As Counsel for the Respondent pointed out, the Appellant's Solicitors have not accepted the responsibility that they were in error themselves in filing an incorrect document and failing to filing an application for leave in time. The explanation regrettably lacked candour. The explanation here remains unsatisfactory.

I remind myself the words of Honourable Chief Justice in **Eddie McCaig v Abhi Manu** (2010)FJSC 18.

[12] Mr Green for the applicant in oral argument said the reason for the 2 days lateness was "miscalculation". On 29th June, 2012 the motion seeking enlargement with the Affidavit of Ajay Singh was filed. The deponent describes himself as a civil servant, without professional address being listed. In the body of the Affidavit he states he is the

Litigation Officer in the office of the Solicitor-General. In paragraph 3 of the Affidavit the deponent says "Counsel for the Applicant/Petitioner had drafted and prepared a Petition for Special Leave to appeal and Leave to appeal out of time...." He does not name the Counsel, whom he knew had drafted the appeal papers or the person who had informed him of this information. Such information should have been provided in order to comply with the rules for the drafting of affidavits in interlocutory proceedings: Order 41 r.5(2). It is not a question of embarrassment, but rather the pre-requisite of accurate evidence to provide the necessary platform in order to succeed in the application.

[13] Further down in the Affidavit he deposes:

> *"7. That I am advised and verily believe that the mistake by Counsel was Inadvertent and was not intentional as he had miscalculated the last date to seek Special Leave."*

[14] Again the informant for this belief is not named, nor the mistake explained. There is a lack of candour in the explanation. How can a qualified Barrister "miscalculate" the 42days? Or was the petition simply lodged late because of Counsel's overlooking of the date when lodgment had to be done? From time to time applications are brought in such circumstances. Counsel appearing usually readily and frankly admits it was his oversight and lapse. The Court thinks none the less of Senior Counsel for such an error. But the Court expects candour and should not be misled in an Affidavit, for such a course may influence the exercise of the discretion; see too Rules for Professional Conduct and Practice (Schedule to the Legal Practitioners Decree 2009) Chapter 3 – Relationship with the Courts para 3.1.

Dealing with the mistaken belief as to the correct legal position on the part of the Appellant's Solicitor, it is admittedly the settled practice that a blunder or a mistake is not a ground for the exercise of the discretion of the Court. The mistake of the legal adviser cannot be relied on to entitle the Court to exercise its discretion to extend the time. The Appellant's Solicitors mistaken belief and the misreading of rules relating to rules governing the filing of documents relating to appeals and leave to appeals is not a ground for the exercise of the discretion of the Court to extend time. It is a matter of contractual obligation between the Solicitors and their own clients and should be disregarded for the purpose of the exercise of the Court's discretion to extend time. It is not draconian an approach to refuse the Appellant the opportunity of continuing the appeal. On the facts of this case it would be unreasonable to give the Appellant an indulgence. With respect, there will be cases in which justice will be better served by allowing the consequences of the negligence of the solicitors to fall on their own heads rather than by allowing an extension of time at a very late stage.

"The rules governing the filing of documents relating to appeals were not set for perverse reasons but to enable the Court to manage its business properly" see; ***Regina v Burtey, the Time Law Reports, November 08, 1994.***

A mistaken belief as to the correct applicable legal position on the part of the Lawyers cannot be condoned.

I remind myself the words of **Blackstone**;

> *"If ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity" [Cited by Francis Bennion, Statutory Interpretation; 4th Edn, Butterworths, 2002 at p.29].*

In **Pitcher v Dimock (1913) 32 NZLR 1127**, the Court of Appeal had refused an application for an extension of time, Denniston J saying at page 1130; 59; The ground of the application is "that a mistake was made in the office of the Plaintiff's Solicitor by misreading the rule. It has now been established by a rule of practice in England that a mistake as to the law whether by Solicitor or Counsel is not ground for granting leave".

Ignorance of Counsel is not a sufficient ground for allowing an extension of time, see; **Native Land Trust Board v Rajesh Kumar and Shiu Prasad, Fiji Court of Appeal, Civil Appeal No: ABU 0054 of 2014, date of Judgment 13-04-2005).**

7. In this case the delay which necessitated the application for extension of time to make an application for leave to appeal is very much long and substantial. The reasons for the delay lacked candour. The explanation here remains unsatisfactory. In such circumstance, the balancing exercise would come down on the side of refusing an extension of time.

Nevertheless, I am bound to consider the **grounds of appeal** urged on behalf of the Appellant on account of the following decisions.

- **Vimal Construction and Joinery Ltd v Vinod Patel and Company Ltd (2008) FJCA 98.**
- **Maciu Tamani Palu aka Maciu Tamanibola Palu and Australia and New Zealand Bank , Misc. 19 of 2011, 8th February, 2013.**

I cannot help thinking that on every application to extend time for leave to appeal there is a pre-appeal hearing in order to consider the **prospects of success**.

I have stated that this matter has its origin in a judgment of Master delivered on 18th February, 2010. I have also stated that the Appellant, Mishra Prakash and Associates (the 4th Defendant) had applied to strike out the Statement of Claim against it. The Master rejected the application.

At the hearing before the court, the Appellant formed the view that the Master's decision is final. I emphatically disagree.

In "Vinod Raj Goundar v The Minister for Health" **Civil Appeal No.: ABU0075 of 2006S,** the Fiji Court of Appeal held;

1. *All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision.*

2. *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.*

3. *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.*

4. *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".*

5. *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 possession.*

6. *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.*

7. *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.*

8. *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.

9. *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.*

10. *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.*

11. *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.*

12. *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:*

    (i) an application to stay proceedings;

    (ii) an application to strike out a pleading;

    (iii) an application for an extension of time in which to commence proceedings;

    (iv) an application for leave to appeal;

    (v) the refusal of an application to set aside a default judgment;

    (vi) an application for leave to apply for judicial review.

Since the decision of the Fiji Court of Appeal in Gounder v Minister for Health (*supra*) there can be no doubt that the Master's decision was an Interlocutory Judgment.

Next, what is the rule of conduct of this Court in an application such as this?

In "Lakshman v Estate Management Services Ltd" (2015) FJCA 26, Basnayake J. A. held:

The test for allowing leave in an interlocutory appeal: The question for determination in this case is, as enunciated in a series of judgments, whether the learned Judge had applied the law correctly in relation to leave to appeal applications and/or made a substantially wrong decision in refusing leave which has caused grave prejudice to the appellant, thus causing a miscarriage of justice. This is what the appellant has to show this Court.

*[39] In Niemann v Electronic Industries Ltd [1978] vic Rp.44' [1978] VR 431 (28 Feb 1978) the defendants sought (by summonses) an order that the action be dismissed for want of prosecution. The primary judge dismissed the two summonses. Mclnerney J said in appeal that they are interlocutory orders which involve the exercise of the primary judge of a judicial discretion to grant or refuse the relief sought. In the same case Murphy J said; "The principles applicable in a Court of Appeal, when sitting on appeal from a discretionary order or judgment, have been the subject of much judicial learning. Those principles appear in civil cases to be conveniently summarized in Australian Coal and Shale Employees' Federation v Commonwealth [1953] HCA 25; (1953) 94 CLR 621, where at p.627, Kitto, J. states: "I shall not repeat the references I made in Lovel v Lovel [1950] HCA 52; (1950) [1950] HCA 52; 81 CLR 513, at pp.532-4) to cases of highest authority which appear to me to establish that **the true principle limiting the manner in which the appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting on a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations or making a mistake as to the facts. Again the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or***

plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. *House v R [1936] HCA 40; (1936) 55 CLR 499 at tpp.504-5: (emphasis added).*

[40] Murphy J said that in order to grant leave, the appellant must established first, "that the discretion of the learned trial judge has been miscarried in one way or another." Murphy J mentioned the cases of Perry v Smith (1901) 27 VLR 66; Dowson v Drosophore Co (1895) 12 R138, Hawkins v Great Western Railway (1895) 14 R360 at 361, 362 and said, "The English authorities emphasized the need to show clearly on an application for leave, that if leave is not given, an injustice will otherwise be done. In Hawkins' case Lord Esher, MR said: "In my opinion it was intended by the legislature that there should be no appeal unless, upon motion to this Court, the Court should be nearly clear as it possible can be without actually hearing the appeal that injustice will be done unless leave to appeal is given." Reference was also made to Rigby LJ in the same case that, "It is only where a patent mistake is pointed out, or where it is made clear that there is some injustice which ought to be remedied, that leave should be granted." Murphy J also cited the following passage in Perry v Smith (supra) at pg 68, "The onus lies on the party who applies for that leave to satisfy the Court of Appeal that the decision of the primary judge was wrong, an in addition to that he has to satisfy the Court that substantial injustice will be done by leaving that erroneous decision un-reversed. Now that is what the counsel for the appellant has to do in this case."

*[41] Murphy J also mentioned the case of Darrel Lea (Vic.) Pty. Ltd. v Union Assurance Society of Australia Ltd; [1969] Vic Rp 50; [1969] VR 401 where the court relied on William J in Perry v Smith (supra) and held that "It is plain, as William J., said, from the terms of the section that the legislature was expressing an intention in the words used that appeals from interlocutory orders should not be permitted except in special circumstances. If on the facts of any particular case a plain injustice has been done by the making of a wrong order, then undoubtedly the Full Court would intervene and grant leave". The court required in that case for the Plaintiff to satisfy two conditions to succeed, that is; "**First, that the decision of the learned Judge was wrong and second, that a substantial injustice would be done by allowing the erroneous decision to stand.**"*

[42] Lord Atkin stated in Evans v Bartlam [1937] AC 473 at 480, "while the appellate Court in the exercise of its appellate power is in no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and duty to remedy it".

[43] In In re the Will of FB Gilbert (deceased) 46 NSW 318, a distinction was drawn between procedural and substantive law while exercising discretion. Jordan CJ (at pg.323) held that, "As pointed out by this Court in In re Ryan (1923) 23 S.R. 354 at 357; 20 Austn Digest 81) there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion while determining substantive rights. In the former class of cases, if tight rein were not kept upon interference with the orders of the judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal. But an appeal from an exercise of a so-called discretion which is determinative of legal rights stands in a somewhat less stringent than those adopted in matters of practice or procedure. ***Leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow."*** *(emphasis added).*

[44] Herring, CJ held in Tidswell v Tidswell (No.2) [1958] Vic Rp 95; [1958] VR 601 (6 August 1958) that, "In cases where there is an appeal from the exercise of discretion by a primary judge, the manner in which it should be determined by a Court of Appeal is governed by established principles, which were clearly stated by Dixon, Evatt and McTiernan, JJ, in House v R [1936] HCA 40; (1936) 55 CLR 499, at pp. 50405 in a passage that Latham, CJ, set forth in his judgment in Lovell v Lovell [1950] HCA 52; (1950 81 CLR 513 at pp 518-9. The passage reads: "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising discretion. If a judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the fact, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred".

As I understand the authorities, the Court requires the Appellant to satisfy two conditions to succeed;

(1) That the decision of the Master is wrong

AND

(2) That a substantial injustice would be done by allowing the erroneous decision to stand.

8. The grounds on which the application to strike out the Claim against the Appellant (the 4th Defendant) were expressed thus;

1. *The Statement of Claim is statute-barred pursuant to the provisions of Section 4 of the Limitation Act in particular over 6 years has expired since instructions for the matters referred to parts 6 and 7 of the Statement of Claim were given and carried out.*

2. *Paragraph 7 of the Statement of Claim against the 4th Defendant be struck out on the basis that there is no conflict of interest or breach of fiduciary duty on part of the 4th Defendant and/or that the same is frivolous and vexatious and/or an abuse of the processes of this Court.*

3. *Alternatively the whole Statement of Claim be struck out as against the 4th Defendant on the basis it is frivolous and vexatious and/or an abuse of process of Court.*

4. *Alternatively the Statement of Claim against the 4th Defendant be struck out as it is based on an alleged Solicitor/Client relationship or contract and is a totally separate cause of action from the causes of action the Plaintiffs have against the 1st, 2nd and 3rd Defendants.*

The Master held that;

(i) the issue of whether or not the claim is statute barred under Section 4 of the Limitation Act (Cap 35) is reserved for the substantive trial.

(ii) whether Mishra Prakash & Associates (4th Defendant)has or had at any time at all exposed itself in a conflict if interest situation or was ever in breach of its fiduciary duty or duties to the plaintiffs as alleged in paragraph 7 of the statement of claim – is reserved for the substantive trial.

(iii) the application to strike out on the ground that the Plaintiffs are estopped by the doctrine of res-judicata from pleading conflict of interest as a cause of action – is dismissed.

(iv) I reserve the issue of whether the claim against Mishra Prakash & Associates

is a totally separate cause of action from that against the other defendants to 29th March 2010 at 10.00 am to be dealt with together with the application for consolidation.

Against that, the Appellant wants to argue as follows; (viz, the Grounds of Appeal)

(1) The Master erred in law in holding that the question of conflict of interest ought to be left till the trial of the action and in not holding that the matter of conflict of interest ought to be determined first.

(2) The Master erred in law and in holding the question of limitation ought to be determined at or after the trial even though six(6) years had expired after instructions had been given and completed.

(3) The Master erred in law in not granting the application to strike out the cause of action against the Appellant and in awarding costs to the Plaintiff and in refusing in awarding costs to the 4th Defendant on the basis of the six year limitation prescribed in Section 4 of the Limitation Act.

(4) The Master erred in law and in holding that the concept of res judicata did not apply after Justice Datt had considered the evidence and ruled in favour of the Appellant on conflict of interest in Lautoka High Court Action No. HBC 251 of 2008. He considered written submissions and made a ruling and gave considered reasons and was a High Court Judge whose decision the Master was bound to follow.

(5) The Master erred in holding that Justice Datt was dealing with an urgent interim application and that therefore conflict of interest was not very relevant at that stage or that Justice Datt relegated the question of conflict of interest and failed to take into account that the Defendant had consented to certain orders thereafter and further that Justice Datt quoted decisions and looked for evidence of conflict (which the Defendant had full opportunity to produce) and when it had filed a comprehensive affidavit to show conflict.

(6) The Master erred in holding or making a ruling against the decision made by a High Court Judge and in by holding that Justice Datt had not made a final decision on the matter.

The Master has reserved the following legal issues for the substantive trial since they are not clear.

(i) the issue of whether or not the claim is statute barred under Section 4 of the Limitation Act (Cap 35).

(ii) whether Mishra Prakash & Associates (4th Defendant)has or had at any time at

all exposed itself in a conflict if interest situation or was ever in breach of its fiduciary duty or duties to the plaintiffs as alleged in paragraph 7 of the statement of claim.

(iii) *whether the claim against Mishra Prakash & Associates is a totally separate cause of action from that against the other defendants.*

I have carefully examined the reasons and the decision of the Master. The Master did not determine the legal issues of conflict of interest, breach of fiduciary duty and limitation. The first, second and third grounds of Appeal refer to matters upon which the Master made no Ruling. The Master reserved the issues of limitation, breach of fiduciary duty and conflict of interest for substantive trial since the Master did not have all the requisite material to reach a definite and certain conclusion. To hold the interests of Plaintiff and Defendants in fair balance in this context the court should be slow to strike out the claim or cause of action in *limine* and the matter must go to trial but against that, if the position is quite clear, then a defendant should not be vexed by having to go to full trial when the answer is obvious and inevitable.

The question for determination in this case is whether a patent mistake of law has occurred in the decision of the Master in refusing to strike out the claim against the Appellant and reserving the legal issues of limitation, breach of fiduciary duty and conflict of interest for substantive trial?

As I understand the law, Order 18, rule 18, is framed in language which is not mandatory but permissive. More precisely, striking out is a discretionary remedy. In my opinion the plain language of the Rule must prevail.

I state with conviction that the summary procedure under Order 18, rule 18 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law. It should not be exercised where legal questions of importance and difficulty are raised.

The following passages are illuminating;

In **Dev v Victorial Railways Commissioners [1949] HCA 1; (1949) 78 CLR 62, 91 Dixon J said:**

> *"A case must be very clear indeed to justify the summary intervention of the court....once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

In **Agar v Hyde ((2000) 201 CLR 552 at 575 the High Court of Australia observed that:**

> *"It is of course well accepted that a court.....should not decide the issues raised in those proceedings in a summary way except in the clearest of cases.*

Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."

The hearing before this Court has taken half a day. Very many authorities were cited by both parties. The extent and the complexity of legal arguments submitted to this Court indicated beyond doubt that the question of Plaintiff's right of action against the Appellant (the 4th Defendant) was one involving deep research and consideration of many authoritative decisions of the Superior Courts. It seems to me, having gone through the Submissions advanced very clearly and lucidly by both sides, that the legal issues sought to be raised by the striking out application are not issues which can fairly be determined without much more thorough examination of the law and the facts. It would be convenient, in my opinion, to start the unravelling of this surprising mish-mash of legal issues at the trial.

In these circumstances, I am firmly of opinion that the Master was right in refusing to strike out the statement of claim under Order 18, rule 18 against the Appellant (the 4th Defendant).

The legal issues of conflict of interest, breach of fiduciary duty and limitation have been advanced as a defence. They can be dealt with at the trial since the Plaintiff has a triable answer to the alleged legal issues of limitation, breach of fiduciary duty and conflict of interest. There is no bar to further litigation of those issues. For my part, I fail to see how the Appellant has thereby prejudiced and/or that any miscarriage of justice has been done.

For my part, I am not prepared to accept the view that there is a patent mistake of law in the Master's decision. I am not clear on what legal principles this proposition is based. I can find no facts here to show that the Master had erred in his approach to the exercise of his discretion because he had applied the wrong principles of law or had given a wholly erroneous weight to some matter or failed to take into account some other matter. Nor can I find any evidence to justify that a substantial injustice would be done by allowing the decision to stand.

I have carefully examined the decision of the Master. I feel bound to say that the Master correctly apprehended and stated the principles to be applied on the hearing of an application to strike out pleadings. He had examined the facts considerably. The Master reserved the issues of limitation, breach of fiduciary duty and conflict of interest for substantive trial since the Master did not have all the requisite material to reach a definite and certain conclusion.

I cannot bring myself to think that the Master erred in his approach in the exercise of his discretion. I am not clear on what legal principle the Appellant's proposition is based.
I am myself not satisfied in the present case that it has been shown that the Master had erred in his approach to the exercise of his discretion in refusing to start the unravelling of this surprising mish-mash of legal issues by summary procedure. Asking myself the overriding question as to whether a substantial injustice would be done by allowing the decision of the Master to stand, I am brought to the view that this is extremely unlikely.

9. Finally, turning to the issue of estoppel by ***res judicata*** , (the 4th ,5th and the 6th grounds of appeal) the Master formed the view that ***res judicata*** does not apply. The Master held that;

> *"Datt J did not make a final decision on the conflict of interest issue. There was no positive evidence before him. But even if there was positive evidence that Mishra Prakash & Associates had confidential information such as the one alleged in the present case (106/09) – it would not have been enough to put Mishra Prakash & Associates in a conflicted position from acting for* ***NFFL*** *in the urgent interim injunction application. Hence – while Datt J may have cited* ***"lack of evidence"*** *as one of the reasons in his ruling, it was more so – in my view – because it was* ***irrelevant.***
>
> *Buckley LJ in* ***Carl-Zeiss-Stiftung*** *observed as follows at page 913 lines C-F:*
>
> > *"No finding or decision would occasion an estoppels unless it were final, but it may be said that* ***no finding or decision on an interlocutory application,*** *apart from the actual relief granted (which may or may not be of a final nature),* ***is final in the relevant sense unless in consequence of the doctrine of res judicata it is a bar to further litigation of that issue.*** *Possibly the solution of this apparent dilemma* ***may depend on whether the issue was explicitly raised in the earlier proceedings*** *and the* ***parties ought to be treated as having then put forward all the facts and arguments*** *which they then considered* ***relevant to its resolution,*** *so that the issue was fully considered on its merits in a judicial manner. Difficulties of the kind noticed by Lord Reid are likely, I think, to arise in a particularly acute form on interlocutory proceedings, where the parties are unlikely to wish to incur in the preliminary stages of an action all the trouble and expense which may be involve in thrashing out a complicated issue".*
>
> *My reading of the above is as follows. An interlocutory finding or decision is prima facie, not "final". However, if in the proceedings on the interlocutory application, the issue was explicitly raised, and the parties had put forward* ***all facts and arguments*** *– relevant – to the resolution of the issue, and the* ***issue was fully considered on its merits,*** *then the principle of res judicata may be applied.*
>
> *Again, applying the above, in this case, it is clear that Datt J had not gone into the merits of the issue of conflict of interest for at least two reason: firstly, because there was "no evidence" so parties cannot be said to have put forward all facts and arguments and secondly, because possession of confidential information was irrelevant to the interlocutory injunction application. All he had to consider was whether the Plaintiff had made out a prima facie case.*
>
> *Accordingly, I dismiss the application to strike out on the ground of res judicata."*

Prima facie, Counsel for the Appellant argued that the Master's decision that Justice Datt's decision is an interim one is an error of law and goes directly against the law of precedent.

In my view, the Appellant cannot stand against the powerful tide of logical and judicial reasoning of the Master on the ground of estoppel by *res-judicata*. It would be tedious to go through them in detail, but I am satisfied that fourth, fifth and sixth grounds of appeal have no merits.

At this moment, I cannot resist in saying that it is the duty of Counsel to assist the Court by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the Court will be capable of fashioning a winner.

F. ORDERS

1. The application for extension of time to make an application for Leave to appeal and for Leave to appeal is refused.

2. The Appellant to pay costs of $1,000.00 (summarily assessed) to the Respondents within 14 days hereof.

HIGH COURT OF FIJI LAUTOKA

19/03/2018.

Jude Nanayakkara
Judge

At Lautoka

Monday, 19th March 2018.