IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 214 of 2012

BETWEEN : **COSTERFIELD LIMITED** as trustee for Costerfield Unit Trust a duly Incorporated limited liability company having its registered office at Level 4, Plaza 1, FNPF Boulevard, 33 Ellery Street, Suva.

Applicant
[Original Plaintiff]
And other Plaintiffs as set out in the Schedule of Statement of Claim

AND : **DENARAU INTERNATIONAL LTD**, a duly incorporated limited liability company, having its registered office at C/- Munro Leys, level 3 Pacific House, Butt Street, P.O. Box 149, Suva, Fiji.

First Respondent
[Original First Defendant]

AND : **DENARAU INVESTMENTS LTD** a duly incorporated limited liability company, having its registered office at C/- Munro Leys, level 3, Pacific House, Butt Street, P.O. Box 149, Suva, Fiji.

Second Respondent
[Original Second Defendant]

Counsel : Messrs Faiz Khan Lawyers for the Applicant
Munro Leys for the Second Respondent

RULING

1. On 12 October 2015, the Respondents filed a Summons to strike out the proceedings. On 08 July 2016, the Master ordered as follows:

    (i) The proceeding against the second defendant is summarily dismissed.

    (ii) The Statement of Claim filed against the First Defendant framed as a class/representative action is struck out and be re-placed under general contract action.

    (iii) I make no order as to costs.

2. On 22 July 2016, the Applicant then filed a Notice of Appeal against the Master's decision. The Master had struck out the claim on the ground that the plaintiffs were purporting to mount a class action but the action was not representative enough to constitute a genuine class action.
3. The said appeal application was called before my brother judge Mr. Justice Sharma on 23 August 2016. Before Sharma J, the respondent raised the preliminary point that the Orders of the Master were interlocutory orders, not final orders and as such, the applicant should have obtained leave first to appeal the decision and file Notice of Appeal.
4. Arguments on the preliminary issue were heard on 23 November 2016 and Sharma J delivered his ruling on 02 December 2016.
5. By his ruling, Sharma J held that the decision of the Master was an interlocutory one and then struck out the proceedings for want of an appeal.

INTERLOCUTORY ORDER –vs- FINAL ORDER

[12] Before a litigant or a solicitor on behalf of a litigant embarks into filing an appeal it is important for that litigant or the solicitor on behalf of the litigant to undertake a research on whether the order or judgment appealed was interlocutory or final and the procedure that applied. The distinction between an interlocutory order or a final order is not an easy one, however, the Court of Appeal in *Goundar –vs- Minister for Health* (supra) has in my view given legal certainty to the law in Fiji in this regard. [13] The Court of Appeal in *Goundar's case* went further to state that the "application approach" was the correct approach when it came to determining whether an order was interlocutory or final depended on the nature of the application filed in court and not on the nature of the order made. At paragraph 38 of the Judgment the Court of Appeal gave some common examples of interlocutory applications as follows:

"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.*

[14] Bearing in mind the decision of the Full Court of Appeal in *Goundar's* case it is now possible to say with certainty that the test whether an order or judgment was interlocutory or final is a legal test rather than a practical one. This appears to be the approach also taken by the Court of Appeal of Vanuatu in *John Dick Miller –vs- National Bank of Vanuatu and The Asset Management*

Unit, Civil Appeal No. 33 of 2005 (26 May, 2006) where the Full Court of Appeal stated as follow:

> *"In our opinion, where an order is made striking out proceedings, even if that order has the practical effect of bringing the proceedings to an end, it is nonetheless an interlocutory order. It follows that leave to appeal is required."*

[15] When coming to a decision that the "application approach" was the correct position of the law in Goundar's case the Court of Appeal had taken into account the test in England at paragraph 28 of the Judgment:

> *"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."*

[16] The Court of Appeal in *White –vs- Brunton* [1984] 1QB 570 in regards to the test mentioned above had taken into account *Salaman vs. Warner* [1891] 1QB 734 where the test was stated in the following words:

> *"... Thus the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the "application approach"."*

[17] Learned counsel for the Appellant (Plaintiff) argues that this court should rely on the test stated in *Stephens –vs- Nunnink* (supra) as the test to determine whether the order made by the learned Master of the High Court was interlocutory or final. Counsel relies on paragraph 12 of the Ruling. The Ruling delivered by a single Justice of Appeal in *Stephen's* case adopted and/or accepted the "application approach" stated in *Goundar's* case which includes the test that gives rise to the "application approach" hence I do not see how reliance on *Stephen's* case will make any difference to the decision arrived at by the Full Court of Appeal in *Goundar's* case, accordingly I reject this argument by the learned counsel for the Appellant as misconceived.

[18] It is now important to see what the High Court Rules state about the procedure that should be followed when it comes to appeals from the decision of the learned Master of the High Court. Order 59 Rule 9 provides:

> *"9. 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 the granting of leave to appeal."*
> *Order 59 Rule 10 provides:*
> *"10. (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."*
> *Order 59 Rule 11 provides:*

"11. 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 delivery of the order or judgment."

[19] I accept that the current law in Fiji in respect of whether an order or judgment is interlocutory or final is the "application approach" and I am satisfied that the order made by the learned Master in response to the striking out application filed by the Respondents was an interlocutory order.
[20] The learned Master delivered his Ruling on 8 July, 2016 and as such the Appellant (Plaintiff) was required under the High Court Rules to file and serve an application for leave to appeal by 22 July, 2016.
[21] The Appellant, however, filed Notice and Grounds of Appeal on 22 July, 2016. It is glaringly obvious that the Appellant has not obtained leave to appeal the interlocutory order of the learned Master which is a requirement under the High Court Rules and as such this court cannot determine the substantive appeal until leave has been obtained by the Appellant.
[22] This court has no powers to deal with this matter any further but to uphold the preliminary issue raised and strike out the Notice and Grounds of Appeal as incompetent for want of leave to appeal.

ORDERS

(1) The Notice of Appeal and Grounds of Appeal dated 21 July, 2016 filed on 22 July, 2016 is hereby struck out as incompetent for want of leave to appeal.
(2) The Appellant (Plaintiff) is at liberty to file an application for extension of time to seek leave to appeal and file Notice of Appeal and Grounds of Appeal.
(3) The Appellant (Plaintiff) is to pay costs to both the Respondents summarily assessed at $500.00 each.

6. The Applicant accepts the decision of Sharma J and concedes that, because the Master's decision was an interlocutory one, it should have sought prior leave.

7. What is before me now is the Applicants Summons filed 09 January 2017 to seek the leave of this Court to appeal the Master's decision out of time.

Issue

8. The respondent raises the argument that while Order 59 of the High Court Rules 1988 makes provision under Rule 8(2) for the seeking of leave to appeal an interlocutory decision of the Master, and while Rule 10(1) relates to an extension of time for filing a Notice of Appeal, there is no provision for extending time to seek leave to appeal an interlocutory decision.

9. The applicant contends otherwise.

10. There are two questions involved.

11. The first is whether Order 59 makes provision for an application for leave to appeal out of time an interlocutory decision of the Master? If not, can this court derive jurisdiction from any other source of law?

12. If the answer is "*yes*", then the second question arises as to what test to apply, and, applying the test, whether or not I should then grant an Order to extend time to the applicant to file an application seeking leave to appeal out of time the Master's interlocutory decision in question.

Does This Court Have Jurisdiction To Extend Time For An Application For Leave To Appeal An Interlocutory Decision Of The Master Out Of Time?

13. Order 59 Rule 8(2) states as follows:

> '8(1) ....
> (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'

14. Order 59 Rule 9 (a) and (b) provide as follows:

> '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.

15. 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.

16. Order 59 Rule 11 states as follows:

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

17. The wording of Order 59 Rule 10 relates only to the enlarging of time for filing and serving a notice of appeal or cross appeal. Prima facie, it does not deal with extending time to seek leave to appeal.

18. In **Abbco Builders Ltd v Challenge Engineering Ltd** Civil Action No. HBC 76 of 2015 which the respondent relies on, Mr. Justice Sapuvida said

that Order 59 does not give the Court power to extend time to seek leave to appeal.

> [41] Furthermore, I accept the argument advanced by the Plaintiff that **Order 59 does not give the Court the power to extend the time to file and serve an application for leave to appeal the Master's Interlocutory order or judgment.** The power given by Order 59 rule 10 to extend time relates to appeals against a Master's final order or judgment.
> [42] Order 59 deliberately differentiates between an application for leave to appeal against a final order or judgment and against an interlocutory order or judgment by giving the Court power to extend only in the case of the former but not in the case of the latter.
> [43] **Order 59 is a code** dealing with all matters relating to the jurisdiction of the Master and for the appeals from the Master's decision. Thus the clear intention of Order 59 is that its specific provisions are to apply over the general provisions of Order 3, r. 4 of the High Court Rules. In ***AG V Howard*** (2011) 1 NZLR 58 the New Zealand Court of Appeal held that an appeal against a decision of Human Review Tribunal could not be regularized under another legislative framework when the Human Rights Act 1993 specifically sets out procedural requirements of how an appeal is to be concluded.

19. By contrast, in **Khan v Ali** [2015] FJHC 433; HBC21.2013 (11 June 2015), Mr. Justice Deepthi Amaratunga granted an application to extend the time to seek leave to appeal out of time an interlocutory decision of the Master. In **Khan v Ali**, Amaratunga J was dealing with an appeal of an interlocutory decision of the Master. The Master had earlier struck out a statement of claim on the ground that the claim was statute barred under the Limitation Act. The leave application was made under Order 59 Rules 10 and 11.

20. Amaratunga J opined that Order 59 Rule 10(1) allows a single judge to extend time for filing a notice of appeal after the expiration of the time period for appeal in Order 59 Rule 9(a) or (b):

> *[2] This application is made in terms of Order 59 rule 10 and rule 11 of the High Court Rules of 1988.* ***Order 59 rule 10 (1) allows a single judge to extend the time period for filing and serving a notice of appeal after expiration of time period for appeal stated in the Order 59 rule 9 (a) or (b).***

21. He appears to endorse the view that Order 59 Rule 10 gives the Court jurisdiction to extend time to seek leave to appeal an interlocutory judgement of the Master.

> [8] The Order 59 rule 10 of High Court Rule grants the court a general discretion in a matter of extension of time. It has not laid out the considerations, but such application should be supported by an affidavit. This indicate that when an extension

is sought some facts relating to the reason for delay needs to be elicited by the applicant.

22. Clearly, Amaratunga J was of the view that Order 59 Rule 10(1) gives the Court power to enlarge the time for filing and serving an application seeking leave to appeal an interlocutory decision of the Master. He went on to say as follows:

> *Since there was an error on the part of the Plaintiff no leave to appeal application was made within the stipulated time. The time period to file such an application seeking leave is contained in Order 59 rule 11 of High Court Rules of 1988. According to the said provision leave to appeal against interlocutory order should be made within 14 days from the delivery of the order.*
>
> *[3] In this instance the Plaintiff had not made such an application seeking leave, but sought an appeal to a judge within the 21 day time period. The Judge who heard the matter had dismissed the appeal since there was no leave granted, without considering the merits of the said appeal.*
>
> *[4] There is no dispute that the application made before the Master was interlocutory as it was made in pursuant to the Order 33 rule 3 of the High Court Rules of 1988. So, the delay was due to error on the part of the Plaintiff who failed to consider the order of the Master as an interlocutory order and considered it as a final order, when an appeal was filed against that, without seeking leave of the court.*
>
> *[5] The Judge who heard the matter while dismissing the matter on preliminary issue also stated that '....Appellant is at liberty to file Application for extension of time to seek leave and file Notice of Appeal and Grounds of Appeal.' This decision was delivered on 14th October, 2014 and on the 4th November, 2014 the present summons seeking extension of time for leave to appeal and leave to appeal was filed.*
>
> *[6] So, the delay of seeking leave is self-explanatory and admittedly an error or mistake on the part of the solicitor for the Plaintiff. The delay or a mistake on the part of the solicitor can be directly attributable to the Plaintiff, but it cannot be considered an abuse of process in the present context.*

23. Having said the above, Amaratunga J then went on to apply the principles of extending time for leave to appeal.

> The appellate courts have found it useful to consider the discretion to enlarge by looking at 5 factors. They are:
>
> (i) The reason for the failure to file within time
> (ii) The length of the delay
> (iii) Whether there is a ground of merit justifying the appellate court's consideration.
> (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
> (v) If time is enlarged, will the Respondent be unfairly prejudiced?'(emphasis is mine)

24. Having applied the above test, Amaratunga J then went on to rule as follows:

Leave to Appeal against the Master's decision

[22] The Master decided that the time period for limitation is 3 years instead of 6 years as per the Fiji Court of Appeal decision. The Master had given reasons for it and applied change of law considering UK decisions. The cause of action was struck off on the basis of limitation period as the Plaintiff had not filed the action within 3 year period.

[23] Generally, leave to appeal is refused for interlocutory decisions. This is mainly done in order to discourage abuse of process through plethora of leave to appeal applications relating to trivial interlocutory determinations. The same should not be true when interlocutory decisions determine the final outcome and striking out of a claim, as in this case.

[24] Fiji Court of Appeal in ***Kelton Investments Ltd v Civil Aviation Authority of Fiji*** [1995] FJCA 15; ABU0034D.95S (18 July 1995) held,

> *'I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see **Hubball v Everitt and Sons (Limited)** [1900] 16 TLR 168).*
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> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example **Ashmore v Corp of Lloyd's** [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.*
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> *The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:*
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> *'......*
>
> ***5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries [1991] FCA 655 104 ALR 62 at 623 lines 29-31).***
>
> ***5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell [1936] HCA 67; (1936) 56 CLR 221 at 224).***
>
> ***5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.***
>
> ***5.5 Even "if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation" (per Murphy J in the Niemann case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.***
>
> ***5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:***
>
> > ***"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."'***

[25] Application of the relevant law would indicate that if the leave is not granted the Plaintiff will not be able to claim for relief in the court of law and he will thus substantial injustice would occur. This should not happen due to any ambiguity of limitation period as they should be clear to all. Though it is an interlocutory decision if the leave is refused there is substantial injustice not only to the Plaintiff but also other litigants who thought the limitation period as 6 years considering the prevailing law in Fiji. So, a determination on this aspect is paramount consideration for the rights of the litigants in order to access justice.

Conclusion

[26] Considering all the factors this is a fit and proper matter to grant extension of time for leave to appeal against the decision of Master delivered on 9th May, 2014 and also leave to appeal is granted on the interpretation of Section 4(1)(i) of Limitation Act (Cap 35) relation to limitation period. Considering the circumstances of the case I am not inclined to grant any cost for this application.

25. Notably, in **Veilave v Naicker** [2017] FJHC 131; HBC159.2013 (17 February 2017), Amaratunga J adjusted his views on the issue. In that case, he opined that there is nothing in Order 59 that grants the Court power to extend the time to file an application to seek leave to appeal an interlocutory decision of the Master:

9. The Order 59 rule 10 applies to the enlargement of time for **Notice of Appeal** or **Cross Appeal** and has no relevance to the Summons filed by the Plaintiff seeking extension of time for Leave to Appeal. It should be noted that both Order 59 rule 10(2) and rule 11 required the service of the application.

10. Neither Order 59 rule 8(1) nor Order 59 rule 10(1) allows the High Court to grant extension of time for leave to appeal against interlocutory decision. The Order 59 rule 11 deals with the leave to appeal and there is no mention of enlargement of time or regarding such application for enlargement of time.

26. But having noted that Order 59 does not give the Court power to extend the time to seek leave to appeal an interlocutory decision of the Master, Amaratunga J then went on to consider whether that power can be found elsewhere in the High Court Rules 1988. In particular, Amaratunga J considered whether Order 3 Rule 4 applied.

11. Since neither side could point out specific law, it is the general provision contained in Order 3 rule 4 of the High Court Rules of 1988 that should be relied on for the Summons filed on 2nd December, 2016 seeking extension of time for leave to appeal against the Master's Ruling

12. The Order 3 rule 4 of the High Court Rules of 1988 applies. It states as follow;

'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 proceeding'. (emphasis added)*

27. I note that the applicant had sought two relief before Amaratunga J, the first under Order 3 Rule 4(1) and the second, under Order 59 Rule 11.

> 13. So, in the summons filed on 2nd December, 2016, sought two reliefs, and the first is extension of time in terms Order 3 rule 4(1), and second, is to seek leave to appeal against the interlocutory order delivered on 11.11.2016, in terms of Order 59 rule 11. By 2nd of December, 2016 the time for an application for leave to appeal fell short by about 1 week, in terms of the said rule 11.

28. Amaratunga J then went on to say that, whether or not leave is granted, is a matter of discretion for the judge and the exercise of that discretion should not be curtailed by rigid rules, particularly if strict adherence to the rules will jettison the determination of the case on the merits. He considered that such an approach may be contravene section 15 of the 2013 Constitution which safeguards access to justice[1].

29. Amaratunga J opined that while there is a right of appeal from a final decision of the Master, and while there is generally no right of appeal against interlocutory decisions as shown by the requirement for leave, some interlocutory decisions have the effect of terminating an action. Such interlocutory decisions must be approached with caution when an application is made seeking leave to appeal them or seeking enlargement of time to seek leave to appeal them.

> 19. Interlocutory orders were often made while the action was pending before the court and finality to orders of the court are essential for progress of the trial. This reasoning will not be always used to all the interlocutory decisions, when the classification is based on Fiji Court of Appeal Case ***Goundarv Minister for Health*** *(supra)*. Some interlocutory decisions will have final effect, though they are classified as interlocutory. A good example is this case. There is no pending action in the court after interlocutory Ruling delivered on 11.11.2016.

[1] He said at paragraph 15.

> 15. It is an exercise of discretion of the court, and there can only be guide lines and rigid rules may curtail the exercise of the discretion of the court and may result injustice and curtail the access to justice on mere technicalities leaving the pertinent legal issues (merits) high and dry. In my opinion though the rules of the court needed to be followed the discretion of the court should not be in favour of dismissal of a matter when there are merits. There are obviously, differences of opinion on the said exercise of discretion, and no rigid rules can substitute this reality. When a party failed to perform a particular act in the specified time it may be due to one reason or culmination of several reasons and in many instances there will be some form mistake or fault on the part of the solicitor. If a mistake of lawyer is excluded as a reason, many a deserving and meritorious application may be dismissed. Though it may be a path of least resistance to dispose numerous applications for extension of time, I am not inclined to take that path. In my judgment such an approach would also not be in accordance with Section 15 of the Constitution of Fiji. The access to justice should not be denied unless there is a specific impediment where discretion of the court is denied or curtailed e.g. Limitation Act (Cap 35).

30. Amaratunga J then cited Hirst LJ in **Finnegan v Parkside Health Authority** [1997] EWCA Civ 2774; [1998] 1 All ER 595[2] and then went on

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[2] He said:

25. About three decades after Ratnam vs. Cumarasamy and Another [1964] 3 All E.R. 935 was pronounced, Finnegan v Parkside Health Authority [1997] EWCA Civ 2774; [1998] 1 All ER 595 the identical provision to High Court Order 4(1) in UK (O.3 r.5) was extensively considered. In that case (Hirst LJ) number of previous decisions (including Ratnam vs. Cumarasamy and Another [1964] 3 All E.R. at page 935) that had different outcomes were discussed and concluded as follow (p 604)(Per Hirst LJ)

> 'At the end of the day, the key criteria in the present case were guidelines 2 and 10 as laid down in the Mortgage Corp case, showing that the overriding principle was that justice should be done, and that in considering whether to grant an extension of time the court would look at all the circumstances including the other considerations mentioned in that judgment.

Further held (p 604)

> ***'In my judgment the starting point is RSC Ord 3, r 5 itself, which explicitly confers the widest measure of discretion in applications for extension of time, and draws no distinction whatsoever between various classes of cases....'*** (emphasis added)

26. Before arriving at the said conclusions Hirst LJ in ***Finnegan v Parkside Health Authority*** [1997] EWCA Civ 2774; [1998] 1 All ER 595 at 596 considered number of decisions that discussed the exercise of discretion under O.3 r.5 in UK (analogous to Order 3 rule 4(1) of High Court Rules of 1988) in detail, and I would quote some of them for completeness and also those UK decisions are helpful as guiding principles for the use of discretion under said High Court Rule.

At pages 598-599 (Per Hirst LJ)

> *'In the leading judgment with which Stuart-Smith and Simon Brown LJJ agreed Bingham MR stated as follows (* [1993] 1 All ER 952 at 959–960, *[1993] 1 WLR 256 at 263–264):*
>
> *'We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary.* ***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*

to exercise a discretion which he said was available to him under Order 3 Rule 4(1) to enlarge the time to seek leave to appeal out of time.

> 27. In the exercise of my discretion under Order 3 rule 4(1) of the High Court Rules of 1988 I have the power to enlarge the time period for an application for Leave to Appeal against the Master's Ruling dated 11.11.2016.I have considered the guiding principles laid in the exercise of general discretion in Order 3 rule 4(1) (analogous to O.3 r.5 of R.S.C UK).

31. I am inclined to follow the approach of Amaratunga J in **Veilave v Naicker**. I think the proposed grounds of appeal have merits and raises

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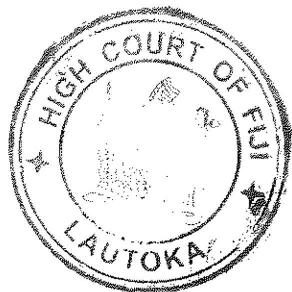
contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless 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.' (emphasis added)

At pages601- 602 (Per Hirst LJ)

".....in Mortgage Corp Ltd v Sandoes [1996] TLR 751, [1996] CA Transcript 1634, which was originally reported in the Times Newspaper on 27 December 1996. In that case the plaintiff was seeking an extension of time for the exchange of witness statements and expert's reports. The appeal was from the decision of Astill J, who had refused leave on the footing, as described by Millett LJ, that unless there were good reasons for the failure to comply with the rules or directions of the court the discretion to extend time would not be exercised.
*Millett LJ, with whom Potter LJ and Sir Christopher Slade agreed, expressly **rejected the argument** based on Astill J's approach that the **absence of good reason was always and in itself sufficient to justify the court in refusing to exercise its discretion,** and held that the true position was that once a party was in default, it was for him to satisfy the court that despite his default, the discretion should nevertheless be exercised in his favour, **for which purpose he could rely on any relevant circumstances.***
There then followed (at 752) a most important passage where the court laid down general guidelines 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 parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.'* (emphasis added)

issues of law that should be tested on appeal. I grant leave to the applicant to apply out of time to seek leave to appeal out of time. Since I have already opined that there are good grounds of appeal shown, I see no reason why I cannot now grant leave to the applicant to appeal the decision of the Master and I so now order also.



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Anare Tuilevuka

JUDGE

07 February 2018