

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 214 OF 2012**

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

**RESPONDENT**  
**(ORIGINAL PLAINTIFF)**

**AND** : **DENARAU INTERNATIONAL LIMITED** 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 APPLICANT**  
**(ORIGINAL FIRST DEFENDANT)**

**AND** : **DENARAU INVESTMENTS PTY LIMITED** 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 APPLICANT**  
**(ORIGINAL SECOND DEFENDANT)**

**Appearances** : Mr R. Newton for the applicants  
Ms S. Devi for the respondent

**Date of Hearing** : 25 June 2019

**Date of Ruling** : 19 August 2019

# **R U L I N G**

[on extension of time to appeal]

## **Introduction**

[01] This is an application to extend the time to seek leave to appeal.

- [02] By a summons supported with an affidavit of Priyaraj Lakmal Munasinghe filed on 9 May 2019, the applicants seek an extension of time to appeal my decision dated 31 August 2018, allowing an appeal brought by the respondent against the ruling of the learned Master (*“the Master”*), striking out the respondent’s representative claim (*“the application”*).
- [03] The respondent opposing the application filed an affidavit of Graeme Knott on 31 May 2019.
- [04] It will be noted that the applicants did not file any affidavit in reply.
- [05] At the hearing of the application, both counsel made oral submissions, and in addition they have filed their respective written submissions. I am grateful to them for their well-researched submissions. I was enormously assisted by their written submission.

## **Background**

- [06] Costerfield Limited, the plaintiff (in these proceedings *“the respondent”*) brought a representative claim against Denarau International Ltd, the first defendant (in these proceedings *“the first applicant”*) and Denarau Investments Ltd, the second defendant (in these proceedings *“the second applicant”*) (collectively *“the applicants”*) for, among other things, damages to the extent of unpaid Villa Revenue in the sum of FJ\$95,000.00 to the plaintiff and FJ\$3,800,000.00 to the Schedule A Villa Owners (52 other plaintiffs).
- [07] On 13 October 2015, the applicants filed an application under O 18, R 18 of the High Court Rules 1988, as amended (*“HCR”*) to strike out the statement of claim and sought an order that the plaintiff not to be permitted to continue the proceedings as representative proceedings under the HCR, O 15, R 14 (1). The Master heard the application and delivered his ruling on 8 July 2016. The Master ordered that: 1. *The proceedings against the Second Defendant is summarily dismissed and* 2. *The Statement of Claim filed against the First Defendant framed as a class/representative action is struck out and be re-pleaded under general contract action* (*“the Master’s decision”*). The respondent appealed the Master’s second decision that the statement of claim filed against framed as a class/representative action is struck out and be re-pleaded under general contract action.

[08] The respondent was successful in its appeal. On 31 August 2018, the Judge of the High Court [I] delivered the appeal judgment setting aside the master's decision. The final outcome of my judgment is as follows:

1. *Appeal allowed.*
2. *Master's order of 8 July 2016 that the Statement of Claim filed against the first defendant framed as a class/representative action is struck out and be re-pleaded under general contract action be set aside.*
3. *The action shall be reinstated back to the cause list.*
4. *The appellant is to continue the action against the first respondent as representing all the other 52 plaintiffs.*
5. *There will be no order as to costs.*
6. *The matter will take its normal course.*

[09] The applicants did not file their appeal against the appeal judgment within the prescribed time for that purpose. As a result, they now seek enlargement of time to appeal.

#### **Preliminary issue**

[10] The respondent has raised a preliminary issue that the affidavits filed in support of this application is defective and irregular as it breaches Order 41, Rule 1 (4). In that, Ms Devi of counsel for the respondent points out that:

*'the deponent has failed to depose the registered address of the place he is employed at'*

[11] On the preliminary issue, Ms Devi submits that an objection in law can be raised at any stage of the proceedings. This defect in the affidavit cannot be cured. On the last hearing date, the court had pointed this out to counsel for the applicant. Despite being alerted on this, the deponent had repeatedly made the same error as before. She therefore invites the court to strike out the affidavit filed in support of this application for irregularity.

[12] Order 41, Rule 1 (4) states:

*'(4) Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his or her occupation or, if he or she has none, his or her description, and if he or she is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.*

*In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the deponent's place of residence, state the address at which he or she works, the position he or she holds and the name of his or her firm or employer, if any.'*

[13] The deponent who swore the supporting affidavit, Mr Priyaraj Lakmal Munasinghe says he is the Chief Executive Officer of the first and second defendants, but he appears to have given his place of residence instead of stating his place of employment.

[14] He has failed to state the address at which he works as required by Rule 1 (4), HCR.

[15] However, the court retains the discretion to grant leave to file and use any affidavit in evidence notwithstanding any irregularity in its form. Order 41, Rule 4 provides:

*'Use of defective affidavit (O 41, R 4)*

*4. An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.*

[16] The affidavit in support filed by the applicants is defective as the deponent has failed to state the address at which he works as envisaged by O 41, R 1 (4). The respondent has responded to that affidavit and they were not prejudiced by that defect. I would, exercising the discretion given to the court under O 41, R 4, grant leave to use the affidavit filed by the applicants despite its irregularity in the form.

[17] I accordingly reject the preliminary issue raised by the respondent.

## Legal framework

- [18] The applicants intend to appeal the judgment delivered on 31 August 2018 setting aside the Master's decision that struck out the respondent's representative claim.
- [19] The judgment of 31 August 2018 was delivered on appeal from the Master's interlocutory order dated 08 July 2016.
- [20] The judgment delivered by this Court on appeal, in my opinion, is a final judgment, and could be appealed to the Court of Appeal within 6 weeks from the date on which the judgment was entered.
- [21] Of the time for appealing, Court of Appeal Rule ('CAR') 16 states:

### *'Time for appealing*

*16 Subject to the provisions of this Rule, every notice of appeal or application for leave to appeal shall be filed and served under Rule 15 (4) within the following period (calculated from the date on which the judgment or order of the court below was pronounced), that is to say-*

*(a) in the case of an appeal from an interlocutory order, 21 days;*

*(b) in any other case, 6 weeks.'*

- [22] The applicant did not appeal the judgment of this court to the Court of Appeal within 6 weeks. The judgment was delivered on 31 August 2018. The applicants could have filed and served their appeal in the Court of Appeal by 12 October 2018. However, they seek leave to appeal and extension of time to appeal the judgment of 31 August 2018, which was delivered on appeal.
- [23] As I said, the judgment of 31 August 2018 is a final judgment as it was delivered on appeal, which finally disposed of the appeal. The applicants therefore had straight right of appeal to the Court of Appeal. Leave to appeal the final judgment was not required.
- [24] The applicants by their application filed on 11 October 2018 seek leave to appeal and extension of time to appeal the judgment dated 31 August 2018.

- [25] Leave to appeal a final judgment is not required. As such, I would only consider the application for extension of time to appeal.
- [26] The application is made under s. 12 (2) (f) of the Court of Appeal Act ('CA Act'), CAR, Rules 26 and 27 and O 3, R 4 of the HCR.
- [27] CAR, 26 and 27 provides:

*'Applications to Court of Appeal*

*26 (1) Every application to a Judge of the Court of Appeal shall be by summons in chambers, and the provisions of the High Court Rules shall apply thereto.*

*(2) Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.*

*(3) Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.*

*Extension of time*

*27 The period for filing and serving a notice of appeal or an application for leave to appeal under Rule 16 may be extended by the court below or by the Court of Appeal.'*

**Principles on extension of time for appealing**

- [28] The following principles may be applied to an application for extension of time for appealing:
- (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? (Native Land Trust Board v Khan [2013] FJSC 1; CBV0002.2013 (15 March 2013), Gates J).*

## Discussion

- [29] The applicants seek enlargement of time to appeal my judgment of 31 August 2018 delivered on appeal from the Master's ruling. The appeal judgment is a final judgment for the purpose of appeal.
- [30] A final judgment or order of the High Court may be appealed to the Court of Appeal within 6 weeks from the date on which the judgment or order was pronounced (see: CAR, Rule 16).
- [31] The judgment the applicants intend to appeal against was pronounced on 31 August 2018. The time for appealing the judgment expired on 11 October 2018. The applicants could have filed their appeal in the Court of Appeal before that date. They did not do so. Instead, they have filed an application for extension of time to appeal. That application has been made on 11 October 2018, the day on which the appealable period of 6 weeks expired.
- [32] The application for extension has been before the expiration of the time for appealing.
- [33] Any application for leave to appeal (whether made before or after the expiration of the time for appealing) may be made to the Court of Appeal (see: CAR, R 26 (2)). However, the period for filing and serving a notice of appeal or an application for leave to appeal under Rule 16 may be extended by the High Court or by the Court of Appeal (see: CAR, R 27).
- [34] I intend to apply the relevant principles to this application.

### *The reason for the failure to file within time*

- [35] The affidavit in support provides the reasons for seeking extension of time as follows:
- a) It took longer than anticipated to arrange for the respective board of directors of the defendants, some of whom had been abroad, to properly consider the terms of 31 August 2018 judgment and orders and their implications.
  - b) It also took longer than expected to have the solicitors for the defendants in Fiji and overseas counsel give properly considered advice on whether

an appeal should be instituted and whether leave to appeal is first required.

[36] In the affidavit in response, the respondent highlighted that the majority of the directors of the applicants are resident in Fiji and out of 10 only one of the directors is resident in New Zealand (see para 13 of the affidavit in response). This position of the respondent remains unchallenged as there was no affidavit in reply to the respondent's affidavit.

[37] Applicants' confusion about the judgment whether it is interlocutory or final is unacceptable as the law is clear on this point after *Goundar v The Minister of Health* [2008] FJCA 40; ABU0075.2006S (9 July 2008).

[38] The applicants had 6 weeks to appeal the judgment. If they had really intended to appeal, they could have filed it within that period. The reason given for extension of time is not satisfactory. They had ample time to determine on whether to appeal or not. They should have realised that the appeal judgment had set aside the interlocutory ruling of the Master and the substantive matter was still to be continued.

*The length of the delay*

[39] The application for extension of time is sought before the expiration of the time for appealing. In the circumstance, the question of the length of the delay does not arise.

*Whether there is a ground of merit justifying the appellate court's consideration*

[40] I now turn to the grounds of appeal.

[41] The draft notice and grounds of appeal challenge the judgment of this court, primarily on the ground that the learned judge erred in holding that a representative action was permissible in circumstances where the respondent and the other plaintiffs were claiming under separate causes of action based on separate contracts, separate representations and separate claims for damages, and that the judge erred in finding that a sufficient degree of commonality of interest existed between the respondent and the other 52 named plaintiffs so as to justify the continuation of the proceedings as representative proceedings.



[42] The judgment the applicants intend to appeal out of time effectively set aside the Master's ruling striking out the respondent's claim and re-pleadings. The effect of the Master's order was that 52 claims had to be brought separately.

[43] The appeal judgment has considered the latest development on representative action and held that damages may now be claimed in representative proceedings where the quantum for each claimant can be determined without the need for protracted proceedings (see: para 45 of the Judgment).

[44] In *Carnie and Another v Esanda Financial Corporation Limited* (1994-19995) 182 CLR 398, it was held that although each contract will be different in the details of the amount involved, this will not eliminate the convenience of finding right to release which is common to all of them.

[45] The respondent had brought a representative action, on his own behalf and on behalf of the other 52 claimants, claiming damages for breach of contract. The appeal judgment found that there was commonality of interest although quantum of damages for each claimant may defer at assessment.

[46] As I find it, the draft grounds of appeal have no merits that has prospect of success, if leave to appeal out of time is granted.

*If time is enlarged, will the Respondent be unfairly prejudiced*

[47] Mr Newton of counsel for the applicants submits that the respondent will not be unfairly prejudiced in extending time to appeal. The respondent has led no evidence as to how a minor delay of the type involved could in any way impede the prosecution of these proceedings on the part of the respondent. Part of the delay to the proceedings as a whole is directly attributable to the manner in which the proceedings were commenced.

[48] In affidavit in response [at para 15 and 16], the respondent states:

*"15. The Applicants are only trying to derail the matter by attempting to file present application with added costs and prejudice to the Respondent for about 7 years now.*

*16. Further the Respondent will be highly prejudiced by the delay in time and costs if an extension/enlargement of time is allowed to seek leave to appeal out of time."*

[49] It is submitted on behalf of the respondent that there will be substantial injustice to the plaintiff and other 52 litigants if leave to appeal is granted.

These attempts by the applicants from time to time since this action has been commenced on 15 November 2012, some 7 years now, has caused the delay, and the matter has only reached up to the discovery stage.

[50] The case is at the discovery stage, albeit it was brought in November 2012. It is still at pre-trial stage. It may take some more years for the matter to reach the trial stage. I am satisfied that the respondent will be highly prejudiced if leave to appeal out of time is granted.

### **Conclusion**

[51] Having considered the application, the affidavits filed by both parties, the oral and written submissions of the parties, I come to the conclusion that the applicants have failed to satisfy me why I should grant leave to appeal the judgment of 31 August 2018 out of time. I accordingly refuse to grant leave to appeal the judgment of 31 August 2018 out of time with summarily assessed costs of \$1,500.00 payable by the applicants to the respondent within 21 days. The substantive matter will resume its normal course.

### **The result**

1. Leave to appeal out of time is refused.
2. Applicants will pay the summarily assessed costs of \$1,500.00 to the respondent within 21 days.
3. The substantive matter will resume its normal course.

*M. H. Mohamed Ajmeer*  
19/8/19

M. H. Mohamed Ajmeer

JUDGE



At Lautoka  
19 August 2019

### Solicitors:

Parshotam Lawyers, Barristers & Solicitors for the applicants  
Faiz Khan Lawyers, Barristers & Solicitors for the respondent