IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 196 OF 2018

BETWEEN	:	**THE ATTORNEY-GENERAL OF FIJI** for and on behalf of **THE MINISTER OF INFRASTRUTURE AND TRANSPORT** **Plaintiff/First Respondent**
AND	:	**FIJIANA BUILDERS AND CONSTRUCTION (FIJI) LIMITED** **First Defendant/Applicant**
		ENGINEERED DESIGNS LIMITED **Second Defendant/Second Respondent**
Counsel	:	**Mr A.K. Singh for Applicant/First Defendant** **Ms J Raman & Ms C Mangru for First Respondent/Plaintiff**
Hearing	:	**29 April 2024**
Judgment	:	**21 June 2024**

JUDGMENT

(Summons for leave to appeal from Master's decision)

[1] On 1 February 2024, the learned Master struck out the First Defendant's counterclaim against the Attorney-General. The First Defendant had failed to obtain leave of the court under O.77, r.4(2) & (3) before filing its counterclaim. The learned Master determined that the omission was fatal.

[2] The First Defendant seeks leave to appeal from the learned Masters decision.

Background

[3] The Attorney-General filed the present Writ of Summons on 3 July 2018. The claim pertains to an agreement between the Minister of Infrastructure and Transport and Fijiana Builders and Construction (Fiji) Limited **(Fijiana Builders)** to build biofuel mills. The mills were built, but the Attorney-General pleads that they were structurally defective. The Attorney-General seeks damages for the cost of repairing the defects, in the amount of $382,000.

[4] Fijiana Builders filed a Statement of Defence and Counterclaim on 12 November 2018. It did not, as it was required to do under O.77, r.4, seek leave of the court before filing the counterclaim against the State.

[5] The Second Defendant, Engineered Designs Ltd, filed its Statement of Defence on 14 December 2018. There followed a Summons for Interlocutory Judgment by Fijiana Builders on its Counterclaim in February 2019. At a mention before the Master on 7 March 2019, the Attorney-General's counsel informed the court that the First Defendant did not have the requisite leave under O.77.

[6] That same month (March 2019) the Attorney-General filed a Notice of Motion to amend its Statement of Claim. Realising its mistake, the Plaintiff replaced the Motion with a Summons. An Amended Statement of Claim was subsequently filed by the Plaintiff on 5 July 2019.

[7] The First Defendant filed a Statement of Defence and Counterclaim to the amended pleadings on 15 July 2019. It again failed to obtain the necessary leave of the court under O.77.

[8] On 7 August 2019, the Attorney-General filed replies to the defences, and on the same date filed a Summons to strike out the First Defendant's counterclaim on the basis, amongst others, that the counterclaim was filed without the requisite leave of the court.

[9] The First Defendant finally put its house in order and filed a Summons on 13 August 2019 seeking leave under O.77, r.4(2)(b) & (3). The orders sought included:

i. That the First Defendant be given leave by the Court to proceed with its counterclaim which had been filed on 15 July 2019.

ii. That the Plaintiff's summons dated 7 August 2019 be stayed.

[10] In addition, on 29 August 2019 the First Defendant filed an affidavit in opposition to the Plaintiff's Summons of 7 August 2019.

[11] A hearing was subsequently conducted before the learned Master. It appears that the hearing was confined to the Plaintiff's Summons to strike out the counterclaim. The learned Master issued an Ex-Tempore Ruling on 1 February 2024. The decision reads:

> 1. *The Plaintiff seek to have the First Defendant's counterclaim filed on 15 January 2019 struck out.*
>
> 2. *Order 77, rule 4 of the High Court Rules prohibits a party from filing a counterclaim against the state without leave of the court.*
>
> 3. *The First Defendant filed its application for leave on 13 August 2019 after the Plaintiff sought orders for striking out.*
>
> 4. *The requirement for obtaining the leave of the court is a prerequisite and mandatory.*
>
> 5. *The First Defendant cannot, after filing its counterclaim, seek leave. This is abuse of court process.*
>
> 6. *Thus pursuant to Order 77, rule 4 (2), and Order 18, rule 18 (1) (d), the First Defendant's counterclaim filed on 15 January 2019 is struck out, together with its application filed on 13 August 2019.*
>
> 7. *The First Defendant is to pay the cost of the Plaintiff's application, summarily assessed at $850, and to be paid by 12 noon on the 9th of February 2024.*
>
> 8. *Summons for direction to be filed and served by 12 noon, 23 February 2024.*

[12] On 8 February 2024, the First Defendant filed a Summons seeking leave to appeal the Master's decision. The First Defendant also sought a stay of the proceeding. The Plaintiff filed an affidavit in opposition on 14 March 2024.

Parties positions

[13] Mr. Singh made the following arguments in support of the First Defendant's application for leave:

i. The delay by the learned Master making a ruling has prejudiced the First Defendant in that the First Defendant is now time barred under the Limitation Act from filing the counterclaim in the proper form under the High Court Rules.

ii. Notwithstanding, Mr. Singh argued that the learned Master's decision is wrong because the Master has failed to consider the court's power under O.2 of the High Court Rules to cure any defect. In reliance, Mr. Singh cites the Supreme Court decision of *Extreme Business Solutions, Fiji Limited v Formscaff Fiji Limited* [2019] FJSC 9 (26 April 2019).

[14] In response, Ms. Mangru submitted:

i. She explained that the usual procedure for filing a counterclaim against the State is that a summons is first made seeking leave. Once granted, then the Statement of Defense and Counterclaim can be filed. Here, no leave was sought before the counterclaim was filed.

ii. The August 2019 summons by the First Defendant seeking leave was defective in two respects. Firstly, leave was sought after the fact. Secondly, rather than seeking leave to file a counterclaim as the First Defendant should have done, it instead sought '*to proceed with its Counter claim*'.

iii. Counsel pointed out that the First Defendant had been informed of the defect in March 2019, yet it made the same error again in July 2019 when the First Defendant filed the counterclaim in response to the Plaintiff's Amended Statement of Claim.

iv. Counsel argued that the oversight was more than just an irregularity in light of the wording of O.77, r.4.

v. With respect to the First Defendant's contention that the delay by the Master had prejudiced its ability to remedy the oversight in 2019, it was pointed out that these applications could have been made in 2019 or whilst the First Defendant was awaiting the ruling from the Master. In other words, the First Defendant was responsible for its time running out.

vi. Counsel described the failures and oversight by the First Defendant as an abuse of process. The Plaintiff was also critical of the fact that this matter is now some five years old and leave to appeal ought not to be granted as this would further delay the determination of the substantive issues.

[15] At the conclusion of the hearing, I directed the parties to file additional written submissions on the test to be applied for the grant of leave under O.77 and to provide authorities on the power of the court to grant leave after a counterclaim has already been filed (as the First Defendant had sought here). I am grateful to counsel for their additional written submissions on these points which I have incorporated into my decision below.[1]

Decision

[16] An appeal lies from a final order or judgment of the Master. Leave to appeal must be obtained from an interlocutory order or judgment.[2] An application for leave, with supporting affidavit, must be filed within 14 days of the order or judgment.[3]

[17] The First Defendant has raised the issue whether leave to appeal is required here in that the ruling by the learned Master could be construed as a final order or judgment. In my view, the ruling was an interlocutory judgment. Tuilevuka J discussed the difference in *Costerfield Ltd v Denarau International Ltd & Anor* [2018] FJHC (7 February 2018). His Lordship stated:

> <u>*INTERLOCUTORY ORDER –vs- FINAL ORDER*</u>
>
> *[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*

[1] The Plaintiff filed further submissions on 21 May 2024 while the Defendant filed further submissions on 6 June 2024.
[2] O.59, r8.
[3] O.59, r.11

behalf of the litigant to undertake 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

[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.*

[18] The application before the learned Master in the present case was to strike out the First Defendant's counterclaim. It comes within the example in 2 above and is, therefore, an interlocutory judgment.

[19] I turn to the test for the grant of leave to appeal. In *Devi v Shah* [2024] FJHC 316, Mackie J set out the test as follows:

> *10. In Prasad v Republic of Fiji & Attorney General (No 3) [2000] FJHC 265; [2000] 2FLR 81 Justice Gates (as his Lordship then was) dealing with an application for leave to appeal to set aside interlocutory order stated:*
>
> > *"In an application for leave to appeal* ***the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted*** *see Rogerson v. Law Society of the Northern Territory [1993] NTCA 124; [1993] 88 NTR 1 at 5-33; Niemann v. Electronic Industries Ltd. [1978] VR 451; Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw (1986) 41 NTR 1.*
> >
> > *Fiji's legislative policy against appeals from interlocutory orders appears to be similar inter alia to that of the State of Victoria, Perry v Smith [1901] ArgusLawRp 51; (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see Ex parte Bucknell [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose* ***a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given*** *Niemann (supra) at 432. It is not sufficient for an appeal court to gauge, that when faced with the same material or situation it would have decided the matter different.* ***The court must be satisfied that the decision is clearly wrong*** *(Niemann at 436).*

Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties *Bucknell (supra) at 225; Dunstan v Simmie & Co. Pty Ltd [1978] VicRp 62; [1978] VR 669 at 670. This is not the case here. Leave could also be given if "**substantial injustice would result from allowing the order,** which it is sought to impugn to stand," Dunstan (supra) at 670; Darrel lea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd [1969] VicRp 50; [1969] VR 401 at 408."*

11. *I am also guided by the decision in* ***Ali v. Radruita [2011] FJHC 302 (26 May 2011****. This was an application for leave to appeal an order made by the Master that the defendant should pay $10,000.00 as interim damages to the plaintiff within 28 days. Calanchini J (as His Lordship then was) said that "It is well settled that* ***only in exceptional circumstances will leave be granted to appeal an interlocutory order****. Leave will not normally be granted unless some injustice would be caused (page 4). Then at page 6 he said:*

    "The exceptional circumstances that the Defendant is required to establish in the present application are that the ***Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded in so much out of all reasonable proportion to the facts proved in evidence****. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master's award to be reviewed".*[4]

[20] There is no dispute that the First Defendant was required to obtain leave of the court before filing any counterclaim against the Plaintiff. The First Defendant overlooked the requirement twice, the second occasion after counsel for the Plaintiff expressly informed the Master and the First Defendant of the requirement on 7 March 2019. On the other hand, there seems little doubt that leave would have been granted if properly applied for (the Plaintiff did not suggest otherwise) and there was no obvious prejudice

[4] My emphasis.

to the Plaintiff with the First Defendant's delay seeking leave in 2019 (the delay was a matter of weeks only in July/August 2019).

[21] In my view leave should be granted to the First Defendant to appeal the learned Master's Ruling. The striking out of the counterclaim is out of proportion to the First Defendant's oversight and results in a substantial injustice to the First Defendant.

[22] The key substantive issue that arises is whether a party is able to retrospectively seek leave under O.77 after it has already filed a counterclaim against the State. If the law is clear on the matter and the court cannot do so then leave to appeal should not be granted. I am satisfied that the court can entertain an application for leave under O.77 after a counterclaim has been filed and, as such, leave to appeal should be granted. My reasons for this conclusion are as follows:

i. The High Court Rules afford the court a very wide discretion to fix irregularities; O.2, r.1 is an apt example for present purposes. The Supreme Court in *Extreme Business Solutions, Fiji Limited v Formscaff Fiji Limited* (supra) considered a similar discretionary power available to the High Court under O.3 to grant extensions. Stock J, providing the decision of the majority, explained the principles that ought to guide the court when exercising these discretions. Stock J stated:[5]

> *[65]* ***I accept that there was in this case a failure to comply with a court order as to time but it is to be noted that the discretion to extend time, conferred by order 3 rule 4, contemplates that such breaches are not of themselves necessarily fatal, although one might observe that the position would be different in the case of an "unless" order. Nonetheless, what this all amounts to in this particular case is the refusal to extend time for service of a notice of appeal where service was a mere three days out of time,*** *where the notice of appeal was filed in the time stipulated, where the judge had held that, prima facie, the prospective appeal had merit and where it is impossible to discern that Formscaff could have been in the least prejudiced by an extension. To refuse in these circumstances a three day extension of time seems to me to permit minor breach to trump merit and that must, I respectfully suggest, be inimical to the objective of the Rules.*

[5] Footnotes not included.

[66] The guiding principle is this:

> ***The object of the rule is to give the court a discretion to extend time with a view to avoidance of injustice to the parties.*** *. 'When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.*

> *[67] The principles are more fully canvassed in Finnegan v Parkside Health Authority [1998] 1 All E R 595 in its reference to a number of other authorities and it is a judgment which merits study.* ***The theme emerges that whilst the rules are devised to promote expedition and are requirements to be met, procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs****. That said, an eye must be trained on the particular circumstances so as, for example, not to allow a wealthy plaintiff to flout the rules knowing that he has a deep pocket to meet such costs orders as might be made. "A rigid mechanistic approach is inappropriate."* ***No doubt the length of the delay will be a relevant factor but generally the question is what the overall justice of the case requires.***[6]

ii. Order 77, r.4(2) required the First Defendant to seek leave of the court to bring a counterclaim against the State where the State has brought a claim in the name of the Attorney-General. Clearly the provision envisages that leave will be sought before the counterclaim is filed. However, where a party fails to do so, there is no obvious reason why the court cannot entertain an application after the fact. Order 77 does not expressly prohibit this. In my view, the oversight or failure by the First Defendant is an irregularity that is curable by the court exercising its discretion

[6] My emphasis.

under O.2, r.1. Such a construction is consistent with the following passage identified by Counsel for the First Defendant in *Hallacy v Pago* [2006] FJHC 161 (31 October 2006), wherein Singh J stated:

> *Now to counterclaim. First, I note that Order 77 Rule 4(2) requires leave of the court before a counterclaim is filed where the State is sued in the name of the Attorney General. No leave was sought but there has been no objection raised either.*

In that case the High Court dismissed the First Defendant's counterclaim on the basis that the claim had not been made out, and not for failure by the defendant to seek leave under O.77, r.4(2).

iii. The Plaintiff states that '*continuous non-compliance*' of O.77, r4(2)(b) as occurred here by the First Defenant '*is not a curable defect*'. The Plaintiff offers no authority to support this proposition and I must say it flies in the face of the comments by Stock J in *Extreme Business Solutions, Fiji Limited v Formscaff Fiji Limited* (supra).

iv. Finally, as stated, in my view it is clear that leave would have been granted for the First Defendant to file the counterclaim had it been sought in the first instance. The counterclaim is detailed, some 13 pages in length (paragraphs 12 to 51). A number of causes of action are pleaded, including breach of contract, negligence, unconscionable conduct, and misleading and deceptive conduct (arising from the same agreement that is the subject of the Plaintiff's claim). With respect to the breach of agreement, the First Defendant contends that the Plaintiff has not paid all the outstanding payments under the agreement or paid the Performance Guarantee Bond. The First Defendant seeks special damages of $159,766.96, interest in the amount of $194,367.22, general damages, costs and so on. The circumstances of the counterclaim are directly related to the matters pleaded in the plaintiff's claim, and it is entirely sensible that the counterclaim and the Plaintiff's claim are determined in the one proceeding.

[23] The First Defendant also seeks a stay of the proceedings. For practical reasons, in my view the stay should be granted. It would be imprudent for the parties to conduct the

interlocutories until the scope of the pleadings have been resolved on appeal. The counterclaim will have a direct bearing on interlocutories, including discovery.

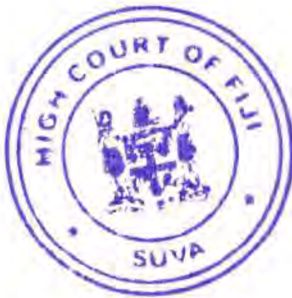
Orders

[24] Accordingly, I make the following orders:

i. Leave is granted for the First Defendant to appeal from the learned Master's decision.

ii. The proceedings are stayed until determination of the appeal.

iii. Costs to be in the cause.



D. K. L. Tuiqereqere
JUDGE

Solicitors:

Office of the Attorney-General's Chambers for the Plaintiff

A.K. Singh Law for the First Defendant

Lajendra Lawyers for the Second Defendant