ABDUL KADEER KUDDUS HUSSEIN

v

NATIONAL BANK OF FIJI

[HIGH COURT, 1995 (Pathik J), 1 June]

Civil Jurisdiction

Practice-Civil-application for leave to appeal against interlocutory order-principles upon which discretion to be exercised-Court of Appeal Act (Cap 12) Section 12(2)(f).

As a general rule there is a strong presumption against granting leave to appeal from interlocutory orders which do not finally determine any substantive rights of either party.

Cases cited:

Darrel Lea v Union Assurance (1969) VR 401
Decor Corp v Dart Industries 104 ALR 621
Dunstan v Simmie & Co Pty Ltd 1978 VR 649
Ex Parte Bucknell 56 CLR 221
Niemann v Electronic Industries Ltd (1978) VR 431
re the Will of F.B. Gilbert (deceased) 46 SR NSW 318

Ruling on application for leave to appeal.

Plaintiff in person
S. Parshotam for the Defendant

Pathik J:

On 16 May 1995 I made an oral Ruling dismissing the Plaintiff's Motion for leave to appeal and stated that I would put my reasons into writing later. This I now do.

The Plaintiff who is in person has applied to Court by Motion dated 27 April 1995 seeking leave of this Court to appeal to Fiji Court of Appeal against an order which I made on 27 February 1995. It was after the defendant had failed to file Affidavit Verifying List of Documents that the Plaintiff applied by Summons to have the Defence struck out; it was on that application that the said Order was made.

The said Summons to strike out was set down for argument on 27 February 1995. At the hearing Mr. Parshotam stated that he has already filed the required document (filed 26.1.95) and the Court could either reject the document or to

deal with the application but the court has power to enlarge time. In reply the Plaintiff said "ask defence to be struck out. Leave to Court".

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In the exercise of the Court's discretion I stated that since the document has now been filed although out of time (after allowing for legal vacation) I see no reason to strike out Defence in the circumstances. Hence I dismissed the application with costs against the defendant in any event.

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Although the Plaintiff says that he is applying under the inherent jurisdiction of the Court, but that is not so. There are specific provisions in the Court of Appeal Rules in this regard and this application should actually be regarded as having been made pursuant to those Rules. The defendant agreed that that was so when it was pointed out to him.

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Under section 12(2)(f) of the Court of Appeal Act Cap 12 leave is required from any interlocutory order; and the time for appealing is 21 days from an interlocutory order "from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected".

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The order in this case was made on 27 February 1995 but not sealed until 9 March 1995. The application is out of time for the Plaintiff had until 30 March 1995 to obtain leave. If the Plaintiff needed an extension of time for appeal purposes under Rule 16 of the Court of Appeal Rules then he would have to comply with the provisions of Rule 27 which requires the application to be made before the expiration of the said 21 days. The said Rule 27 provides as follows:-

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> "Without prejudice to the power of the Court of Appeal ... to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period." (emphasis added)

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The Plaintiff did not apply until 25 April 1995 and the reason he gives for late application is that he could not get a copy of Fiji Republic Gazette in time to annex the Legal Vacation Notice to his affidavit. This is hardly an excuse when Gazette is available everywhere and he did not have to go to Archives for it.

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Therefore, as Mr. Parshotam argues, and I agree with him, this Court cannot entertain this application in the circumstances by virtue of the provisions of said Rule 27.

The application could be dismissed on this ground alone, but because the Plaintiff is unrepresented I will consider whether there are grounds for allowing the application.

On the law, I am grateful to Mr. Parshotam for his usual clarity and concise statement of the law on the subject of leave. The authorities he has quoted are right on the point on the matter before me and I adopt them here. A

Looking at the nature of the case and the circumstances leading to the making of the order, I find that this application is frivolous and devoid of any merit whatsoever. In Ex parte Bucknell (56 CLR p.221 at p.224) the Court said:

> "At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under sec. 35(1) (a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment." B C

In his Affidavit in support the plaintiff raised a number of irrelevant matters. The only relevant matter is his complaint that the Court should have refused to accept the filing of document in question because the delay was caused due to legal vacation. His facts in this regard are not quite correct and I have already stated what is recorded in the file as having been said. It was in the exercise of its discretion that court made the said order. In this context I refer to the following passage from the judgment of Jordan C.J. In re the Will of F.B. Gilbert (deceased) 46 SR NSW p. 318 at 323 which is apt: D E

> "as was pointed out by this Court in In re Ryan, 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. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up 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 different position." F G

This is a classic case of an abuse of the process of the Court. The reason for the need to obtain leave is designed to reduce appeals from interlocutory orders

whenever possible (Niemann v Electronic Industries Ltd (1978) VR 431 at 441-2) and this is one example of a situation which needs no further consideration because of the frivolous nature of the application but this may be due to the Plaintiff being a layman. But Court will grant leave where acting judicially it finds reason to do so. (Decor Corp v Dart Industries 104 ALR 621 at 623)

In the present case now that an order has been made, the road is clear for the Plaintiff to get on with the prosecution of the action and to see that the action proceeds to trial. That should be more important to him in this case instead of fiddling around with baseless applications which fact should have been obvious to him. There is no injustice to the Plaintiff in the granting of the Order. It has been said by Murphy J in Niemann (supra) at p.441 that:

> "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".

And in Darrel Lea v Union Assurance (1969) 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."

Also on the subject of injustice Young CJ and Jenkinson J In Dunstan v Simmie & Co Pty Ltd 1978 VR 649 at 670 stated:

> "...although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the preliminary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."

A useful summary of some of the matters which a judge may in practice consider on an application for grant of leave is to be found In the judgment of Murphy J in Niemann (supra) at p.441 which I adopt and they are as follows:-

> "(1) whether the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;

(2) whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been "sorely troubled";

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(3) whether the order made has the effect of altering substantive rights of the parties or either of them; and

(4) That as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party."

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To conclude, bearing in mind the facts of the case and the circumstances of this application, and applying the principles pertaining to leave, I find that this application is frivolous and devoid of any merit and if anything, it is an abuse of the process of the Court judging from the grounds put forward in the affidavit in support.

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The application is therefore dismissed with costs against the Plaintiff to be taxed if not agreed.

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(Application dismissed.)

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