PETER IAN KNIGHT v DONALD ROSS and ROBERT REILLY and Anor (ABU0003 of 2004S)

COURT OF APPEAL — APPELLATE JURISDICTION

WARD P and BARKER JA

23 October, 27 November 2006, 9 March 2007

Practice and procedure — costs — High Court made no judgment on award of costs due to oversight — clarification sought from High Court but denied for lack of jurisdiction — first Respondents sought clarification before Court of Appeal — whether first Respondents entitled to costs — first Respondents obtained favourable judgment from High Court — no reason to deny costs — Court of Appeal Act (Cap 12) s 56(2).

The first Respondents (R1) obtained a favourable judgment against the Appellants in the High Court based on solicitor's negligence. The Court of Appeal upheld the judgment but varied the apportionment of liability of the Appellants. The court however, through an oversight, made no judgment on the award of costs. R1 first sought clarification from the High Court which denied the action for lack of jurisdiction. R1 sought clarification from the court on whether they were entitled to the costs awarded by the High Court. However, one of the judges who decided the Respondents' case had since retired. The issue before the court was whether it could still rule on the issue of costs under those circumstances.

Held — (1) The court's omission to deal with R1's costs in the High Court was within the jurisdiction conferred by the Rule. The Rule was applicable because there was an accidental omission in this case.

(2) R1 obtained favourable judgment from the High Court. Accordingly, there was no reason to deny them costs, nor did they display any conduct which would justify any diminution in their entitlement to costs.

(3) The only change to be made to the costs order made by the High Court was that the costs ordered to be paid by the High Court to R1 should now be paid in line with the apportionment of liability as determined in the court's initial decision.

Application granted.

No cases referred to.

The Appellant in person

D. Sharma for the first Respondents

H. Nagin for the second Respondent

[1] Ward P and Barker JA. On 26 November 2004, this court (Ward P, Barker and Tompkins JJA) delivered judgment in this appeal. Essentially, the court upheld the judgment for damages awarded in the High Court in favour of the first Respondent (R1) against the Appellant based on solicitor's negligence.

[2] This court however varied the judgment of the High Court which had assessed the liability of the Appellant and the second Respondent (R2) as equal. This court held that the proper apportionment of liability was 75% on the part of the Appellant and 25% on behalf of the R2.

[3] In the formal judgment of the court, orders for the costs in this court were made which endeavoured to reflect the respective outcomes for all parties on the appeal. Unfortunately, through an oversight, no order was made regarding the costs awarded to the R1 in the High Court. They had been successful in both courts. The High Court had ordered costs in favour of the R1 "to be taxed if not agreed".

[4] An application had been filed by the R1 in the High Court in October 2005 for a ruling on whether this court intended the to be entitled to the costs awarded in their favour in the High Court. The parties argued this application before Coventry J on 27 March 2006. Not surprisingly, the judge ruled, on 31 March 2006 that he had no jurisdiction to deal with the matter and that the R1 should apply to this court for a ruling. We are at a loss to know why, when there was no agreement on whether the R1 were entitled to the costs awarded in the High Court, a simple memorandum had not been filed in this court seeking a ruling.

[5] On 25 September 2006, the R1 filed a motion in this court seeking the court's clarification as to whether they were entitled to receive the costs awarded to them in the High Court.

[6] On 27 November 2006, Ward P, sitting as a single judge of this court, heard the application. He advised counsel that Barker JA was sitting at the next sessions of the court. Since Ward P and Barker JA had been two members of the court which had given the unanimous judgment on 26 November 2004, counsel agreed that it was sensible to await Barker JA's arrival and for Ward P and Barker JA to rule on what was this court's intention in respect of the R1's costs in the High Court.

[7] Accordingly, the court, sitting with two judges, gives this clarification of its earlier judgment. The President of the Court is of the opinion that it is impracticable to summon a court of three judges for this application. (See 56(2) of the Court of Appeal Act (Cap 12).) Tompkins JA, the other member of the court in November 2004, has now retired as a judge of this court.

[8] The jurisdiction of the court to rectify accidental steps or omissions is found in the English Rule 20.11.1 which provides:

> Clerical mistakes in judgments or orders, or errors arising from any accidental slip or omission may at any time be corrected by the Court on motion or summons without an appeal.

This English Rule is applicable because there is no apposite rule in the Fiji Court of Appeal Rules. Under r 7 of those Rules, the current practice and procedure of the English Court of Appeal applies when there is no appropriate provision in the Fiji Rules.

[9] Counsel on 27 November 2006 referred Ward P to the relevant commentary on the above-quoted rule in the White Book. We are satisfied that rectification of the court's omission to deal with the R1's costs in the High Court comes within the jurisdiction conferred by the Rule. The Rule applies where there was an accidental omission, as occurred here. The omission failed to express the court's manifest intention.

[10] We have no doubt that the R1 are entitled to the costs awarded to them in the High Court. There was no reason for this court to have denied them these costs. They had succeeded both in this court and in the High Court. There was no conduct on their part which would justify any diminution in their entitlement to costs in the High Court. Most of the argument at the appeal hearing concerned the respective liabilities of the Appellant and the R1 for the R1's loss.

[11] The only change needing to be made to the costs order made by the High Court is that the costs ordered to be paid by the High Court to the should now be paid as to 75% by the Appellant and 25% by the R2. That must be because of the decision of this court varying the contributions of those parties to the R1's loss.

[12] Although we regret the oversight by the court in not addressing the R1's High Court costs in the judgment, we should have thought that the court's intention in that regard was tolerably clear. We wonder why counsel could not have sorted the matter out without making an application to the High Court which was bound to fail, plus a further contested application to this court.

[13] The judgment of the court of 26 November 2005 is varied by adding a further order as s (f) on p 23. "The costs awarded to the second respondents in the High Court will stand, save that those costs, as taxed, are to be paid as to 75% by the appellant and 25% by the first respondent."

[14] We make no order as to the costs of this application.

Application granted.