

**IN THE SUPREME COURT OF FIJI**  
**[CIVIL APPELLATE JURISDICTION]**

**Civil Petition No. CBV 0003 of 2015**  
**(Court of Appeal No. ABU 19/2012)**

**BETWEEN** : AMBARAM NARSEY PROPERTIES LTD

**PETITIONER**

**AND** : MOHAMMED YAKUB KHAN & OTHERS

**1<sup>st</sup> RESPONDENTS**

**AND** : LAUTOKA CITY COUNCIL

**2<sup>nd</sup> RESPONDENT**

**CORAM** : Hon. Mr. Justice Saleem Marsoof, Justice of the Supreme Court  
Hon. Mr. Justice Brian Keith, Justice of the Supreme Court  
Hon. Mr. Justice Buwaneka Aluwihare, Justice of the Supreme Court

**COUNSEL** : Mr. B. C. Patel for the Petitioner  
Ms. N. Khan for the First Respondents  
The Second Respondent did not appear and was not represented.

**Date of Hearing:** 12 April 2016

**Date of Judgment:** 22 April 2016

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**JUDGMENT OF THE COURT**

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**Marsoof, J**

I have read a draft of the judgment of Keith J, and I agree with his reasoning and conclusion.

## Keith, J

### Introduction

1. This is the latest installment in a long-running saga about building works which went wrong. The present appeal is confined to a narrow but by no means straightforward issue arising out of the Court of Appeal's attempt to "clarify" its judgment. It is necessary to put that issue in its proper context, and accordingly a comparatively brief outline of the proceedings is required.

### The proceedings in the High Court

2. The nature of the case. The case concerns a plot of land at 21 Yasawa Street, Lautoka. It was owned by the First Defendants, the Khan brothers. They wanted a four storey building with a supermarket constructed on it. They engaged building contractors and a structural engineer, and plans and specifications were prepared. Those plans and specifications were approved by the Second Defendant, Lautoka City Council ("the Council"). The work was carried out between 1992 and 1994.
3. There was an adjoining building at 19 Yasawa Street. It was owned by the Plaintiff, Ambaram Narsey Properties Ltd ("ANB"). In the course of time, the building suffered a good deal of settlement. ANB blamed the settlement on the works being carried out on the adjoining land. In 1996 it brought proceedings in the High Court against the Khan brothers and the Council. Its case against the Khan brothers was that the building contractors and structural engineer had been negligent in various respects, and that the Khan brothers were liable for their negligence. ANB's case against the Council was that it had negligently approved the plans and specifications on inadequate information and in breach of the relevant building regulations, and that during the building works it had failed to ensure that the specific conditions of the building permit were being adhered to.
4. The trial. The trial of the action took place in March 2002. Judgment was given on 20 December 2007. The judge found for ANB against both the Khan brothers and the

Council. He apportioned liability between them on the basis that the Khan brothers were liable for 80% of ANB's damages and the Council for 20%.

5. ANB's damages. When it came to the amount of ANB's damages, the judge concluded that ANB had suffered loss under two principal heads of loss. First, he found that ANB's building had to be demolished. Accordingly, the first head of loss was the cost of demolishing and reinstating it. Secondly, part of ANB's building had previously been rented out. Accordingly, the second head of loss was the rent which ANB had not received. The judge adopted ANB's calculation of its losses in the Re-Amended Statement of Claim. He set out that part of the Re-Amended Statement of Claim in his judgment. ANB's losses under these two heads of loss up to 31 March 2002 (ie the end of the month in which the trial had taken place), including interest on the loss of rent (which was calculated to be \$401,010) at the rate of 10.25%, amounted to \$1,444,083.03. The judge did not award interest on the cost of demolishing and reinstating the building. That was because ANB did not claim such interest as that expenditure had not been incurred by the date of the trial.
6. The judge then turned to the loss of rent from 1 April 2002 up to the date of his judgment. He awarded ANB compensation for that loss of rent at the rate of \$4,450 a month up to the date of his judgment. It is unclear on what basis the judge made that order. He may have had evidence by the date of his judgment that there had been no rental income up to then. Alternatively, there may have been no direct evidence to that effect, but the judge inferred – perhaps from the time he thought it would take to demolish and reinstate the building – that there had been no rental income up to then.
7. The judge also awarded ANB interest on the loss of rent from 1 April 2002 to the date of his judgment. The order he made was as follows:

*“Interest on loss of rental of \$401,060 as at 31<sup>st</sup> March 2002 and from 1<sup>st</sup> April 2002 to the date of judgment at 6%.”*

The sum of \$401,060 was a mistake. The sum the judge had in mind was \$401,010. But more significant is what the order meant. Did it mean that the interest on the loss of rent from 1 April 2002 was limited to the loss of rent of \$401,010 which had accrued up to 31 March 2002? Or was the judge awarding interest to ANB, not just on the loss of rent of \$401,010 up to 31 March 2002, but also on the loss of rent from 1 April 2002, until the date of his judgment?

8. This was not an issue raised before us, but in my opinion, the judge must have awarded the latter. That is the only way to give effect to the word “and” in his order. The word “and” would otherwise have been redundant. He simply chose not to repeat the words “loss of interest” after the word “and”. Moreover, it would not have made much sense for the judge to have awarded ANB loss of rent from 1 April 2002 to the date of his judgment if he was not at the same time awarding ANB interest on that loss.

Subsequent loss of rent

9. This is where the current appeal arises. The judge did not make an award for loss of rent beyond the date of his judgment. That could have been because he simply overlooked it. Alternatively, it could have been because he thought that ANB was not entitled to such an award: perhaps he thought that by then any loss of rent would not have been attributable to the Defendants’ negligence. But that would not necessarily have been the case. The judge might have thought that any loss of rent continued to be attributable to the Defendants’ negligence, but that he did not know whether the building had been reinstated by then, and if it had not been, when it was likely to be reinstated by. After all, ANB may not have had the funds to reinstate it without the damages they had been awarded. Without knowing whether the building had been reinstated by then, and if not when it was likely to be reinstated by, the judge might have thought that he could not say for how long the loss of rent was going to continue.
10. In fact the reason why the judge did not make an award for loss of rent beyond the date of his judgment is almost certainly a much simpler one. Going on the part of the Re-

Amended Statement of Claim which the judge set out in his judgment, there was no pleaded claim for loss of rent after the date of the High Court's judgment. The relevant passage in the pleading was:

*"Plus loss of rental from 1/4/2002 to date of judgment @ \$4450.00 per month"*

It did not include words like "and continuing" or "and thereafter" after the words "to date of judgment".

*The proceedings in the Court of Appeal*

11. The Council filed a notice of appeal against the judgment of the trial judge. Its case was that the trial judge should not have held it to be liable to ANB. The notice of appeal was filed on 17 April 2012, almost 4½ years after the judgment, and more than 10 years after the trial judge had reserved judgment. There was no application for an enlargement of time in the notice of appeal, nor was the fact that it had been filed so many years out of time referred to in the judgments of the Court of Appeal. There may have been good reasons why the appeal was despite that allowed to go ahead, even though they are not apparent from the papers we have.
12. The Court of Appeal's judgment was given on 5 March 2014. The Council's appeal was dismissed, save that two minor heads of loss which the trial judge had awarded in his global figure of \$1,444,083.03 were disallowed. ANB applied for special leave to appeal to the Supreme Court against the disallowance of one of those heads of loss, but special leave to appeal was refused.
13. The significant part of the appeal to the Court of Appeal for present purposes relates to an application made to the Court of Appeal on behalf of ANB. That was that (a) ANB's compensation for loss of rent from 1 April 2002 (which the trial judge had awarded up to the date of his judgment) and (b) the interest on the loss of rent as at 31 March 2002 (which the trial judge had also awarded up to the date of his judgment) be extended from the date of his judgment to the date of the Court of Appeal's judgment.

convincing themselves that they cannot ever have intended it”. Indeed, permitting the court to clarify what it meant would be inconsistent with the proposition that another court having to consider what an earlier court meant is required to disregard any evidence from the earlier court of what it had meant: see *Brennan v Prior and ors* [2015] EWHC 3083 (Ch) at [21]. The remedy which a disappointed litigant has is to appeal and persuade the appellate court that the lower court meant what the appellant claims it meant.

18. It is unnecessary for me to engage with these propositions. That is because I agree with Mr. Patel that the Court of Appeal’s order properly reflected its judgment. As I have said, the order tracked the language of its judgment. So what did the order say? It said that “the sums awarded by the trial Judge” should be extended to the date of the Court of Appeal’s judgment. And which of those sums was the Court of Appeal referring to? Mr. Patel says that the order did not purport to exclude any of the sums which the trial judge had awarded from the sums which should be extended to the date of the Court of Appeal’s judgment. Therefore, the Court of Appeal must have intended for *all* the sums awarded by the trial judge – including loss of rent – to be extended to the date of the Court of Appeal’s judgment. That is so obvious, said Mr. Patel, that there was no ambiguity which the Court of Appeal needed to clarify, assuming that it had the power to clarify any ambiguity in its judgment.
  
19. I do not agree with this reading of what the Court of Appeal ordered. The clue is what the Court of Appeal said in paras 201 and 202 of its judgment. It did not want ANB to be out of pocket as a result of the delay in bringing the appeal on. ANB had to be compensated for the fact that it had been kept out of its money since the date of the judgment of the trial judge. And how should ANB be compensated for that? The answer can only be by giving ANB interest on it. So in order to give effect to the Court of Appeal’s rationale for extending “the sums awarded by the trial Judge” to the date of the Court of Appeal’s judgment, you have to treat the words “the sums awarded by the trial Judge” as limited to such interest as the judge awarded on the ANB’s damages. The upshot is that such ambiguity as there may have been in the Court of Appeal’s order has been resolved by

paras 201 and 202 of its judgment. There was therefore no need for the Court of Appeal to be asked to clarify its judgment, nor should the Court of Appeal have acceded to that request. Its judgment made the order it made quite clear.

20. Indeed, I go further. Although it was entirely appropriate for ANB, on the hearing of the Council's appeal, to ask the Court of Appeal to extend the award of interest to the date of the Court of Appeal's judgment, I do not think that the Court of Appeal should have been asked to extend the loss of rent in the same way. I do not see how the Court of Appeal could have made such an award, bearing in mind that the trial judge had not done so, without there being an appeal by ANB from the judge's decision not to do so. Even if I was prepared to treat ANB's application to the Court of Appeal as an appeal from the decision of the trial judge to limit ANB's loss of rent to the period up to the date of his judgment, such an appeal would have had little chance of success bearing in mind that the reason why the judge had not done so was almost certainly because no such claim had been made in the Re-Amended Statement of Claim. The simple fact is that the trial was ANB's only opportunity to recover loss of rent beyond the date of the judgment of the trial judge. That is because of the long-standing principle that damages must be recovered in one action once and for all. In a case where the plaintiff is claiming for future loss, the judge in that action has to assess what that loss is likely to be. A litigant does not get a second bite of the cherry later on, even if unanticipated losses then arise.

### Conclusion

21. For these reasons, although the Court of Appeal should not have purported to clarify its earlier judgment, what it claimed its earlier judgment had meant was what I have decided it did mean. There is no other route by which ANB can recover loss of rent beyond the date of the judgment of the trial judge. The extent to which a court can subsequently clarify its judgment is a matter of substantial general interest to the administration of civil justice, but that does not arise for discussion in this case because the Court of Appeal's judgment was clear enough. It follows that I would refuse to give ANB special leave to

appeal to the Supreme Court. Although costs normally follow the event, I would order that there be no order for costs. It was the Khan brothers who asked the Court of Appeal to clarify its judgment. That was unnecessary, and but for that an appeal would not have been pursued.

**Aluwihare, J**

I have read in draft the judgment of Keith J. I agree with the reasoning and the conclusion of the same.



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**Hon. Mr. Justice Saleem Marsoof**  
**Justice of the Supreme Court**



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**Hon. Mr. Justice Brian Keith**  
**Justice of the Supreme Court**



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**Hon. Mr. Justice Buwaneka Aluwihare**  
**Justice of the Supreme Court**