IN THE SUPREME COURT OF FIJI

AT SUVA

CIVIL PETITION NO: CBV0010 OF 2021

Court of Appeal No. ABU 0076 of 2020

BETWEEN : **BARSTOCK INVESTMENTS (FIJI) LTD**

Petitioner

AND : **NATALIE KATZMANN**

Respondent

Coram : **The Honourable Mr. Justice William Calanchini**
Judge of the Supreme Court

: **The Honourable Mr. Justice Terence Arnold**
Judge of the Supreme Court

: **The Honourable Mr. Justice Filimone Jitoko**
Judge of the Supreme Court

Counsel : **Mr R. Singh for the Petitioner**

: **Ms V. Lidise for the Respondent**

Date of Hearing : **15 August 2023**

Date of Judgment : **31 August 2023**

JUDGMENT

Calanchini, J

[1] I have read in draft form the judgment of Arnold J and agree with his reasoning and his conclusions.

Arnold, J

Introduction

[2] In January 2005, the Respondent, Ms Katzman and her husband were guests at a resort owned by the Petitioner, Barstock Investments (Fiji) Ltd (Barstock). Ms Katzman alleged that while there, she swallowed several mouthfuls of detergent from a water bottle thinking it was water. She claimed that the water bottle had been filled negligently, and left in her room negligently, by one of Barstock's employees. Ms Katzman issued proceedings against Barstock seeking damages for personal injuries she claimed to have suffered as a result.

[3] Ms Katzman was unsuccessful in the High Court.[1] She filed an appeal against this judgment (which I will call the principal judgment) within time. Several months after, the trial Judge delivered his decision on costs (the costs ruling).[2] The Judge said that he intended to assess costs on the standard basis but on an increased cost scale, reflecting Ms Katzman's conduct of the proceedings. He fixed the amount of costs at $37,550 (plus $2,000 for the costs application itself). Ms Katzman filed an appeal against that decision as well.

[4] At this point, Barstock's solicitors wrote to Ms Katzman's solicitors saying that Ms Katzman could not file an appeal against the costs ruling without the Court's leave,

[1] *Katzman v Barstock Investments (Fiji) Ltd* [2020] FJHC 303.
[2] *Katzman v Barstock Investments (Fiji) Ltd* [2020] FJHC 636.

relying on s 26(2)(e) of the Court of Appeal Act 1949. Ms Katzman's solicitors did not accept this, so Barstock filed a notice of motion in the Court of Appeal to strike out Ms Katzman's costs appeal.

[5] Barstock's application came before a single Judge of the Court of Appeal. The Judge determined that leave to appeal was not required as the appeal against the costs award was effectively one element of the appeal against the principal judgment. The Judge also made an order that the appeal against the principal judgment and that against the costs ruling be consolidated. He made no order for costs on the application.

[6] Barstock then filed a petition for leave to appeal to this Court against the Appeal Court Judge's decision.

Barstock's petition

[7] The principal points on which Barstock seeks leave to appeal concern whether Ms Katzman required leave before she could appeal the costs ruling and whether the Judge was right to make the consolidation order. Specifically, Barstock asks for orders that:

(a) the Appeal Court Judge's ruling be set aside in its entirety;
(b) Ms Katzman's Notice of Appeal against the costs judgment be dismissed; and
(c) Ms Katzman pay the Petitioner costs on an indemnity basis.

In the alternative, Barstock asks that the consolidation order be stayed and that Ms Katzman (or her legal adviser) pay costs to Barstock on an indemnity basis.

Analysis

[8] I begin with the question whether Ms Katzman needed leave to appeal the costs ruling and then discuss consolidation.

Did Ms Katzman need leave to appeal the costs ruling?

[9] Mr Singh for Barstock argued that s 12(2)(e) of the Court of Appeal Act required Ms Katzman to obtain leave to appeal the costs ruling. Section 12 deals with appeals in civil cases. Section 12(1) allows for appeals "from any decision of the High Court sitting in first instance". However, this is subject to s 12(2), as Mr Singh emphasised. Section 12(2)(e) provides that no appeal shall lie "*without the leave of the court or the Judge making the order, from an order of the High Court or any Judge thereof made with the consent of the parties* ***or as to costs only****".* [Emphasis added.]

[10] Mr Singh argued that Ms Katzman's appeal against the costs ruling was an appeal against a "costs only" order within the meaning of s 12(2)(e). By virtue of Rule 26(3) of the Court of Appeal Rules 1949, the leave application had to be made in the first instance to the High Court Judge.

[11] In addressing this argument, I begin with the policy behind s 12(2)(e). Requiring leave to appeal against decisions *"as to costs only"* is not unique to Fiji − the same requirement appears in other jurisdictions.[3] The rationale for the requirement is that the award of costs is generally a matter of the court's discretion, so that leave to appeal will only be granted if the tests generally applicable to appeals against discretionary judgments are met, for example, the trial judge made an error of principle, took irrelevant matters into account or overlooked relevant matters. As in other instances of discretionary assessments which do not determine substantive rights, appellate courts show restraint in interfering with costs orders.

[12] There are various reasons for the leave requirement in relation to "costs alone" appeals, for example:

(a) to protect the courts from meritless challenges to costs awards, which simply result in the incurring of further costs;

[3] For example, all of the Australian States except Victoria have statutory provisions requiring leave for "costs only" appeals: see *Dal Pont on the Law of Costs* (4th ed, 2018) at para 20.37.

(b) to avoid allowing litigants to use costs appeals as vehicles to re-litigate the substantive issues;

(c) given the nature of costs assessments, appellate courts are unlikely to be as well positioned as trial judges in assessing the relevant factors;

(d) not encouraging unwarranted delay in the final resolution of litigation;

(e) avoiding incurring costs disproportionate to the value of the original subject matter of the litigation.

Overall, the courts are concerned that appellate processes do not become overburden with skirmishes about costs.

[13] Australian authority indicates that leave to appeal is not required where there are other substantive grounds in the appeal, even if the appeal against costs in a discrete ground: see, for example, the decision of the Full Court of the Supreme Court of South Australia in **Yip v Frolich**.[4] The United Kingdom Court of Appeal has expressed the same view, as appears from the decision discussed at paragraphs [22] – [23] below.

[14] To consider whether this case falls within s 12 (2) (e), it is necessary to consider the trial Judge's principal judgment and Ms Katzman's response to it. In the principal judgment, the trial Judge concluded that Ms Katzman had failed to establish on the balance of probabilities that she suffered injuries because of a negligent act by Barstock. She therefore failed on liability.

[15] In addition, the Judge concluded the principal judgment by dealing with costs as follows:

> *"[116] As a winning party, the defendant [Barstock] is entitled to costs of defending these proceedings. The defendant submits that the plantiff's [Ms Katzman's] claim should be dismissed with costs on an indemnity basis or alternatively costs on a higher ?? in favour of the defendant.*
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> *[117] It is apparent the defendant has incurred substantial costs in defending this matter over the years since the institution of this action in 2005.*

[4] *Yip v Frolich* [2004] SASC 287, (2004) 89 SASR 467 at paras [91]-[94]. See also *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 (CA) at pp 32-33, per Kirby P. His Honour said that he regarded "the [first instance Judge's] order disposing of costs as one of the orders disposing of the entire proceeding".

[118] In my view, the defendant is entitled to costs, which is to be assessed."

[16] The Judge stated the outcome of the case as follows:

> *"**The Outcome***
>
> 1. *Plaintiff's claim dismissed.*
> 2. *Plaintiff shall pay costs, which is to be assessed, to the defendant".*

Those, then, were the orders of the Court. Their effect is that Ms Katzman was ordered to pay costs to Barstock, but the amount remained to be assessed.[5]

[17] Ms Katzman filed a timely appeal against this judgment. Her Notice and Grounds of Appeal sought the following order:

> *"that **the judgment of the Honourable Mr. Justice M.H. Mohamed Ajmeer delivered on 7th May 2020 dismissing the Appellant's (original Plaintiff) claim and ordering the Appellant pay the Respondent's (original Defendant) costs to be assessed, be set aside** and that this Honourable Court of Appeal enter judgment in favour of the Appellant and assess damages in accordance with the Appellant's claims, together with costs on an indemnity basis or higher scale, and/or make such other orders as it deems just."* [Emphasis added]

So, the notice of appeal challenged both the trial Judge's findings on liability and his decision to award costs to Barstock. Moreover, in the notice of appeal Ms Katzman explicitly reserved the right to file further grounds of appeal once the Court Records were prepared.

[18] Two months after he delivered the principal judgment, the trial Judge delivered his ruling on the amount of costs to be paid by Ms Katzman. Ms Katzman then filed a Notice and Grounds of Appeal against the costs ruling. In it, she asked for an order that the costs ruling be set aside in its entirety if her appeal against the Judge's findings on liability was

[5] It is clear from the costs ruling that the trial Judge saw it in this way: see paras [1] and [14] of the ruling.

successful or, if her appeal in relation to liability was unsuccessful, that costs for the trial be assessed on a standard basis.

[19] In relation to Ms Katzman's application that, if her appeal was successful, the trial Judge's costs ruling be set aside it is clear, in my view, that she did not require leave as her appeal was not *"as to costs only"*.

[20] To explain this conclusion, in the principal judgment, the trial Judge ordered Ms Katzman to pay costs, although the amount was left to be quantified. Ms Katzman's notice of appeal against the principal judgment clearly stated that both the trial Judge's liability determination and his costs order were the subject of appeal. The trial Judge later quantified the amount of costs in his costs ruling. Ms Katzman could have filed an amended notice of grounds of appeal to incorporate the grounds in relation to the costs ruling rather than a new notice of appeal. But the basic point is that the Judge's costs order was under appeal from the outset and the second notice simply provided particulars of the grounds of appeal in relation to costs.

[21] To put the point another way, there were not two separate appeals but one appeal with two linked components – liability and costs, as the Court of Appeal Judge said.

[22] However, as noted above, Ms Katzman's notice of appeal against the costs ruling covered two alternatives – namely, that she succeeded or failed on her liability appeal. It could be argued that in appealing against the costs order if she failed on her liability appeal, she was appealing *"as to costs only"* and therefore required leave. There is support for this proposition in some Australian authorities[6], but not in others[7] and it is an approach which has been rejected in the United Kingdom in cases such as **Wheeler v Somerfield**.[8]

[23] In that case, Lord Denning MR said of the United Kingdom equivalent to s 12(2)(e):[9]

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[6] For example, *Schonnecht v Golden Carsket Art Union* [1994] QCA 480 at 5-7, which Mr Singh cited.
[7] *Dal Pont*, above n 3, at para [20.38].
[8] *Wheeler v Somerfield* [1966] 2 QB 94 (CA).
[9] At 106. See also Harman LJ at 106-107 to the same effect: "If there is a genuine appeal of substance, the fact that it fails does not make it impossible for the court to go on and deal with costs, provided of course that they are discretionary costs".

> "*As I have always understood this section of the Judicature Act, it means this: If a person makes no complaint against the judgment below, except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. But if he makes a complaint, not only about costs, but also about other matters, then he can appeal both on those other matters and also of the costs; and the court has full jurisdiction to deal with them. Even if he fails on the other matters, this court has the jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine.*

[24] I prefer the approach adopted in the United Kingdom over that adopted by some of the Australian courts. It does have one disadvantage in that it may be open to abuse by parties initiating meritless substantive appeals with the real purpose of challenging the costs award, thereby avoiding the requirement to obtain leave. But the courts have mechanisms for controlling that sort of abuse of the court's processes, e.g. further costs awards, perhaps even against solicitors or counsel.

[25] On the other approach, it would not be clear whether or not leave was required until the substantive appeal had been determined. Having to obtain leave at that point to pursue the costs appeal seems an unduly cumbersome process. An appellant could get leave at the same time as instituting the substantive *"as of right"* appeal, against the possibility that the substantive appeal might fail, but that also seems wasteful of time and resources.

[26] For these reasons, I do not consider that Ms Katzman required leave to appeal the costs ruling.

Consolidation

[27] Mr Singh raised three points in relation to the consolidation order made by the Court of Appeal Judge. He argued that:

> *(a) There was no application for a consolidation order before the Court, and such an application was necessary. Rather, the Judge acted of his own initiative.*

(b) Barstock's right to be heard on the issue was beached.

(c) The consolidation order will result in the appearance of bias or because "without prejudice except as to costs" (Calderbank) letters from Barstock to Ms Katzman will form part of the consolidated record before the Court of Appeal. Accordingly, they will be before the Court when it considers the issues relating to liability.

[28] For Ms Katzman, Ms Lidise argued that Barstock had not demonstrated any real or actual detriment that it has suffered, or will suffer, because of the consolidation order.

[29] I begin by noting that consolidation issues generally arise where different sets of proceedings are consolidated into a single proceeding because, for example, they involve common issues or arise out of the same set of transactions.[10] Normally, this occurs early in the litigation process. Consolidation orders are made for reasons such as increased efficiency and avoiding inconsistent decisions by different judges. Where different sets of proceedings are proposed to be brought together and dealt with as one, it is obviously important that the parties have the opportunity to make submissions about that proposed course of action.

[30] This case is fundamentally different as it involves hearing two elements of the same proceeding – liability and costs – on an appeal. Section 20(1) (j) of the Court of Appeal Act authorises a judge of the Court of Appeal *"generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal".* In my view, that empowered the Judge to make the order he did about the appeal hearing.

[31] The real issue is whether the Judge's order in some way prejudices Barstock and, if so, how that can be addressed. The prejudice that Mr Singh identified is that Barstock made three Calderbank offers to Ms Katzman in the course of the proceedings. Because those letters were *"without prejudice except as to costs"*, they are relevant to the costs appeal − the Judge in fact referred to them in his ruling. If one Record covering both liability and

[10] An alternative to consolidating different proceedings into one is to hear cases together or hear one immediately after the other. In that situation, the proceedings remain separate.

costs is prepared for the appeal, these letters will, Mr Singh says, have to be included and will be available to the Judges in the context of the liability appeal. As a consequence, there will, at the very least, be an appearance of bias. Mr Singh noted that the letters were not available to the trial Judge until after the liability judgment was delivered, and said that in analogous contexts, such as payments into court, potentially prejudicial information is kept away from trial judges.

[32] I make two observations about this submission. First, the fact that Barstock made substantial offers by way of settlement to Ms Katzman is already in the public arena. As I have said, the trial Judge referred to this in his costs ruling, and that ruling is publicly available on PacLii.

[33] Second, and more importantly, Mr Singh could seek Ms Lidise's agreement to leaving the letters out of the Record for the time being, on the basis that they will be available to the Court if necessary. Mr Singh could seek an order from a judge of the Court of Appeal to that effect if necessary. I note that the only aspect of the Calderbank letters that is likely to be of interest on the costs appeal is the amount of money offered and the nature of Ms Katzman's response, both of which are already in the public arena as a consequence of the publication of the costs ruling.

[34] For present purposes, the important point is that there are ways of addressing Mr Singh's concerns apart from bringing the matter to this Court.

Disposition

[35] I would refuse the petition for leave to appeal and order the Petitioner to pay costs of $5,000.00.

Jitoko, J

[36] I have had the advantage of reading in draft the judgment of Arnold J in this appeal and I express my entire agreement with his reasoning and conclusions.

[37] ***Orders***

1. *The petition for leave to appeal is dismissed.*
2. *The Petitioner must pay the Respondent costs in the amount of $5,000.00.*

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The Honourable Mr. Justice William Calanchini
Judge of the Supreme Court

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SUPREME COURT FIJI

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