

**IN THE SUPREME COURT OF FIJI**  
**APPELLATE JURISDICTION**

**CIVIL PETITION NO. CBV 0018 of 2023**  
**Court of Appeal No. ABU 0014 of 2020**

**BETWEEN** : 1. **MOHAMMED AIYUB**  
2. **MOHAMMED HASSAN**  
3. **MOHAMMED FAREED KHAIRATI**  
4. **MOHAMMED ABDUL GAFFAR KHAIRATI**  
*Petitioners*

**AND** : **MOHAMMED SHAHEEM KHAIRATI**  
*Respondent*

**Coram** : **The Hon. Justice William Calanchini**  
**Judge of the Supreme Court**  
  
**The Hon. Justice Terence Arnold**  
**Judge of the Supreme Court**  
  
**The Hon. Justice William Young**  
**Judge of the Supreme Court**

**Counsel** : **Mr. S. F. Koya, Mr. S. A. Koya and Mr. S. P. Kumar for the**  
**Petitioners**  
**Ms. D. A. T Chambers and Ms. P. Prasad for the**  
**Respondent**

**Date of Hearing** : **16 August, 2024**

**Date of Judgment** : **30 August, 2024**

**JUDGMENT**

**Calanchini, J**

[1] I have had the advantage of reading in draft form the judgment of Young J and agree with his conclusion that leave to appeal should be declined.

**Arnold, J**

[2] I agree with the reasons of, and orders proposed by, Young J.

**Young, J**

[3] The dispute concerns the estate of the late Mr Khairati. I will refer to him as “the testator.”

[4] Litigation involving the estate and an associated partnership was settled on 17 July 2006. Under this settlement, the petitioner (Mohammed Aiyub) and another person became trustees of the estate. That other person having died, Mr Aiyub became the sole trustee. The estate included several properties referred to in the litigation by reference to their Certificates of Title. One of these was CT 6225. The respondent, Mohammed Shaheem Khairati, is the grandson of the testator and his father was one of the beneficiaries under the testator’s will. He is the executor of his father’s estate. I will refer to him in the way in which his counsel did, as Mr Shaheem, and, for ease of discussion, treat him as if he was a direct beneficiary of the testator’s estate.

[5] In September 2016, Mr Shaheem commenced proceedings against Mr Aiyub alleging various breaches of trust. The relief sought included damages of \$28,571 for breach of trust and an order that Mr Aiyub provide full accounts of the estate. Mr Aiyub’s defence was substantially premised on a deed apparently entered into on 6 May 2009 by, amongst others, Mr Shaheem’s father. Mr Shaheem’s response to that was that his father had not signed the deed.

[6] During the preliminaries to the trial of the proceedings, the High Court ordered Mr Aiyub to:

... provide a full account of [the estate] including all monies received from rental of the estate property ....

[7] Following 8 days of trial, the litigation was settled in terms of a consent order made on 15 February 2019 on terms that inter alia provided that:

- (a) The deed of 6 May 2009 was unenforceable.
- (b) The estate was to be distributed in accordance with the settlement of 17 July 2006.

- (c) Mr Aiyub was removed as trustee and replaced by another member of the family.
- (d) In relation to the claim for \$28,571, Mr Aiyub was required to pay Mr Shaheem \$20,000.
- (e) CT 62225 was to be sold.
- (f) The distribution of the shares as between the beneficiaries “shall be determined and assessed by the Court.”
- (g) The parties and new trustee “shall be at liberty to apply generally.”
- (h) The settlement “shall be the full and final settlement between the parties.”

[8] Primarily in issue now is a claim by Mr Shaheem for his share of rent received in respect of CT 6225. In a summons issued on 21 August 2019, Mr Shaheem sought an order that Mr Aiyub pay him his share of the rent. However, the summons also raised the issue “whether [Mr Shaheem] is entitled to damages.” The grounds of the proposed claim for damages were not particularised but I infer it was intended to encompass a possible complaint that Mr Aiyub had not acted diligently in relation to the fixing and collection of rent. The respondents to this application were not only Mr Aiyub, against whom it was primarily aimed, but also three other beneficiaries of the estate who had generally aligned themselves with Mr Aiyub in the primary litigation. They are also petitioners before this Court but, a basis for any possible liability on their part not having been spelt out, I propose to treat the issue before us as if it is confined to Messrs Shaheem and Aiyub.

[9] In a judgment delivered on 26 February 2020, Ajmeer J held that the terms of the consent order precluded a claim in relation to rent. So, he dismissed the application. In his judgment, he noted that Mr Shaheem was seeking relief not only in respect of the rent received by Mr Aiyub but also by way of damages. He did not seek to distinguish between these two heads of claim.

[10] The Court of Appeal allowed Mr Shaheem’s appeal. This was for reasons given by Lcamwasam JA. He drew attention to the provision of the consent order that the distribution of the shares between the beneficiaries is to be determined by the Court. He saw this as encompassing the dispute as to rent. He also noted that, at the time of the

consent order, Mr Aiyub was in breach of the earlier order requiring him to render accounts.

[11] The Court allowed the appeal – and by implication directed that Mr Shaheem’s application be determined by the High Court. I will come back shortly to what this entails.

[12] On behalf of Mr Aiyub, Mr Koya argued that Mr Shaheem’s claim in relation to rent and any potential claim as to damages was inconsistent with the terms of the consent order when read as a whole. His challenge to the Court of Appeal reasoning was well-presented and he made some persuasive points. The issues associated with rent in relation to CT 6225 had been dealt with in evidence in the proceedings that were settled by the consent order. Other areas of dispute dealt with in evidence were addressed specifically in the consent order. On this basis, Mr Koya argued, the absence of any specific provision as to rent in the consent order strongly suggested that all possible issues as to rent were subsumed in the full and final settlement provision of the order.

[13] While I acknowledge the force of Mr Koya’s argument, it only partly persuades me. I see it as justifying the conclusion that a claim for damages based on lack of diligence in relation to rent would be inconsistent with the scheme of the consent order. But I do not see this as applying to rent that Mr Aiyub actually collected from the trust property.

[14] As to rent collected:

- (a) The consent order did not discharge the earlier order of the court requiring him to file accounts in relation to the estate including in relation to all rents received.
- (b) Any payments by way of rent that Mr Aiyub had received were assets of the estate. A fair distribution of the assets of the estate necessarily requires him to account for what he has already received.
- (c) The future role of the Court provided for in the consent order in the determining the distribution of the assets of the estate along with the reservation of leave to apply put constraints on the scope of the full and final settlement provision in that order.

[15] On the other hand, as I have noted, I see the consent order as precluding claims for damages or compensation against Mr Aiyub for negligent performance of his duties. To conclude otherwise would not give reasonable effect to the full and final settlement provision in the consent order. On this basis, I do not consider that it is open to Mr Shaheem to seek relief that is premised on a contention that if Mr Aiyub had acted more diligently as trustee, he would have obtained more rent for CT 6225 than he did. During argument, Ms Chambers KC said that Mr Shaheem would not seek to recover damages assessed on that basis.

[16] The Court of Appeal judgment does not address in any detail either the reference to damages in the summons or its implications for the rehearing in the High Court. As will be apparent, I consider that the judgment should be read as requiring Mr Shaheem's claims in relation to rent received to be heard and determined in the High Court but that this does not extend to any claim for damages. To be more specific:

- (a) Mr Shaheem may seek relief in relation to any rent that Mr Aiyub can be shown to have received. As to this Mr Shaheem is not confined to rent payments that Mr Aiyub acknowledges having received. If there is a dispute in this regard, the Judge will have to decide on the balance of probabilities how much rent Mr Aiyub received.
- (b) Mr Shaheem may not seek damages or compensation premised on contentions along the lines that Mr Aiyub could have obtained more rent if he had been more diligent.

[17] The case concerns an issue that is specific to the effect of a consent order in terms that were very particular to the dispute between the parties. In terms of the leave criteria in s 7(3)(a) and (b) of the Supreme Court Act 1998, it does not raise a "far reaching question of law", "a matter of great general or public importance" or a "matter of substantial general interest to the administration of justice" in terms of s 7(3)(c).

[18] For those reasons, but with my clarification of what is required by the Court of Appeal judgment, I would refuse leave to appeal.

[19] Ms Chambers for Mr Shaheem sought an order for costs that going beyond the current conventional figure of \$10,000. In doing so she relied on a *Calderbank* offer Mr

Shaheem had made as to costs. She also made the reasonable point that the particularity of the dispute meant that it was never likely that this Court would conclude that the petition crossed the leave threshold.

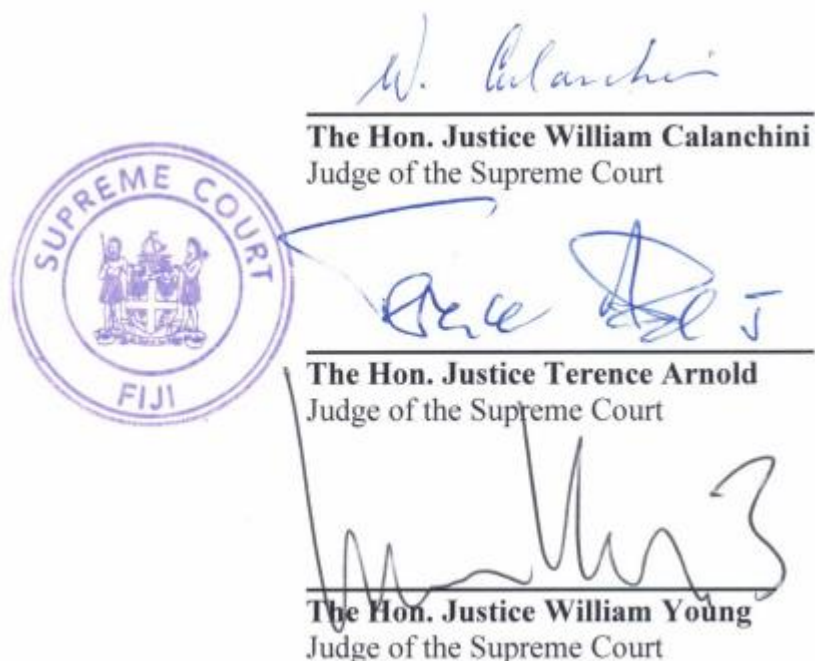
[20] I am not inclined to make such an order. The scope of the consent order in relation to rent was not entirely clear, leaving at least scope for the argument that Mr Koya made. As well, the way in which the Court of Appeal expressed its judgment meant that it would have been at least arguable that Mr Shaheem could pursue a claim for damages in the High Court. It was important that this be sorted out – as it now has been – before the case is dealt with again in the High Court. For this reason, I think that there has been utility in the hearing before us that would not have been achieved if the *Calderbank* offer had been accepted.

[21] I would therefore award Mr Shaheem costs summarily assessed of \$10,000.

**Orders of the Court**

(a) *The petition is dismissed.*

(b) *The petitioners are to pay Mr Shaheem costs, summarily assessed, of \$10,000.*



The Hon. Justice William Calanchini  
Judge of the Supreme Court

The Hon. Justice Terence Arnold  
Judge of the Supreme Court

The Hon. Justice William Young  
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The image shows three handwritten signatures in blue ink, each placed above a horizontal line. Below each line is the printed name and title of the judge. To the left of the signatures is a circular purple stamp of the Supreme Court of Fiji, featuring a central emblem with two figures and the text 'SUPREME COURT' and 'FIJI'. A blue line points from the stamp to the signature of Justice Calanchini.