

SICOA-CAC 27 of 2016 & 09 of 2017 (5 May 2017)

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from Judgment of the High Court of Solomon Islands (Civil Division)

COURT FILE NUMBER: Civil Appeal Case Nos. 27 of 2016 and 09 of 2017
(On Appeal from High Court Civil Case No. 322 of 2012)

DATE OF HEARING: 2 MAY 2017

DATE OF DECISION: 5 MAY 2017

**DATE REASONS HANDED
DOWN:**

THE COURT: Goldsbrough P
Ward JA
Wilson JA

PARTIES: SHIYAO GUO Applicant
CHINA UNITED (SI) CORPORATION LTD 2nd
Applicant
RAY CHU 3rd Applicant
JUNBIN GUO 4th Applicant
JUNZONG GUO 5th Applicant

V

AUSTREE ENTERPRISE PTY LTD 1st Respondent
ZONG WU ZHOU 2nd Respondent
LING YUN ZHOU 3rd Respondent

ADVOCATES:

Applicants: T. Matthews Q.C. and with him D Keane & A Wong

Respondent: C. A. Johnstone and with him M Doyle & D Marahare

**EX
TEMPORE/RESERVED:** RESERVED

ALLOWED/DISMISSED DISMISSED

JUDGMENT OF THE COURT

1. These are the reasons for the decisions handed down on 5 May 2017 on leave to appeal in the two applications brought on appeal in an ongoing civil trial numbered High Court Civil Case 322 of 2012. Those decisions were handed down with reasons to follow as the trial in the court below was scheduled to resume on Wednesday 10 May 2017 and during the hearing of these applications we indicated that, in the event we had made our decisions, we would deliver them and reserve our reasons for future delivery.
2. For ease of reference we agreed during this hearing that the Applicants could be referred to as Appellants. We also were referred to paragraph 2 of the earlier judgment of 14 October 2016 of this Court wherein leave was granted to amend the application for leave to include all applicants, that being all five defendants in the court below. Although it appears that no order was filed thereafter and no amended application, that position remains unchanged. All five defendants make these two applications.
3. In both matters an order is sought that the application for leave and the substantive appeal be heard together. An order to that effect in respect of the 2016 matter was made in 2016 and we are content for the same course to be adopted in the 2017 matter.
4. We did not hear the appeals together save in the sense that we heard the second in the afternoon following the morning hearing of the first. It is convenient, however, to set out the reasons for the two related appeals in one document for delivery purposes.
5. By claim filed 23 September 2011 the respondents seek, amongst other relief, specific performance of an agreement. The claim has been amended several times since then and there is a defence, amended defence and multi-faceted counterclaim.
6. Appeal 27 of 2016 is against the decision of the Commissioner of the High Court (the Commissioner) hearing the trial wherein he granted leave to amend the further amended further amended further amended claim. That decision, dated 26 September 2016 is set out in the Appeal Book and concludes with the orders made therein which are as follows:-
 1. Leave is granted to the claimants to further amend its claim and statement of case in accordance with the draft further amended further amended further amended claim handed up to the court on the 21st September 2016 save that the amendments relating to the alleged loans to the first defendant Guo reflected in paragraphs 14A, and the unjust enrichment claims against the first defendant in paragraphs 14B and 14C thereof are admitted only provisionally pending further consideration at the end of the trial.
 2. Leave to the defendants to file any further amended defences within 14 days.

3. Leave to the claimants to file a further amended reply within 5 days thereafter.
 4. The trial is adjourned to commence on Monday 17th October 2016 at 9.30 am.
 5. The orders previously made for the trial to proceed in stages are revoked and the trial will now proceed in the usual way.
 6. In the event that an application is made by the claimants to extend time, that matter may be raised in reply and considered in closing submissions.
 7. The claimants shall pay the defendants' costs occasioned by the amendment and thrown away by reason of the adjournment to be agreed or assessed.
 8. The time for the defendants to comply with any outstanding orders is further extended until Monday 10th October 2016 at 4.00pm with liberty to apply on short notice.
 9. Any objections by the claimants to statements filed by the defendants shall be filed and served by 13th October 2016 at 4pm and any responses to the objections shall be delivered to the claimants by 9am on 17th October 2016.
 10. Any further time extensions sought by the defendants in respect of orders 8 and 9 hereof may be made to me by written submissions by the parties emailed to my associate and served on each other unless the claimants object to that course, in which case the application will be listed for hearing on Monday 17th October 2016.
7. The application for leave to appeal the interlocutory orders described above sets out nineteen grounds of appeal. Ground 1 amounts to no more than a general statement of dissatisfaction. Grounds 2 to 7 raise the issue of when the cause of action accrued and the applicable limitation provisions and their effect. Grounds 8 to 10 concern the provisionally admitted amendments as against only the First Appellant and the applicable limitation period. Grounds 11 to 13 consider the scope of the power to permit amendments and grounds 14 to 19 general case management principles.
 8. Between the order appealed being made and the subsequent scheduled trial resumption a sitting of this Court heard and determined an application for stay based on this same application for leave. That application for stay was refused. A judgment was published. Thereafter the Commissioner made an order by consent with further directions the effect of which was to allow the appellants, *inter alia*, a lot more time to prepare for trial of the much amended claim. A date in March 2017 was arrived at for the resumed hearings.
 9. Civil Proceedings in Solomon Islands benefit from the Solomon Islands Courts (Civil Procedure) Rules 2007 (the Rules) which came into force in 2008 and apply to both the Magistrates' Court and the High Court. They do not apply to the Court of Appeal which is regulated by its own Act and Rules made thereunder. The relevant Rules on

this appeal begin with Rule 1.3. For convenience that rule and subsequent relevant rules are set out:-

Overriding objective

1.3. The overriding objective of these rules is to enable the courts to deal with cases justly with minimum delay and expense.

1.4 Dealing with cases justly includes, so far as is practicable:

(a) ensuring that all parties address the real issues of the proceedings;
and

(b) saving expense; and

(c) dealing with the case in ways that are proportionate:

(i) to the importance of the case; and

(ii) to the complexity of the issues; and

(iii) to the amount of money involved; and

(iv) to the financial position of each party; and

(d) ensuring that the case is dealt with speedily and fairly; and

(e) allocating to each case an appropriate share of the court's resources,
while taking into account the need to allocate resources to other cases.

Courts to apply overriding objective

1.5 The courts must give effect to the overriding objective when they:

(a) do any act under these rules; or

(b) interpret these rules.

Courts' duty to manage cases

1.6 In particular, the courts must actively manage cases.

1.7 Active case management includes:

- (a) encouraging the parties to co-operate with each other during the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and resolving the others without a hearing;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging parties to use an alternative dispute resolution procedure if the court considers it appropriate, and facilitating its use;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing a timetable for the case or otherwise controlling its progress, and monitoring compliance by the parties;
- (h) considering whether the likely benefits of taking a particular step justify the costs of taking it;
- (i) dealing with as many aspects of the case as it can at the one time;
- (j) dealing with the case without the parties needing to be at court;
- (k) taking advantage of available technology;
- (l) giving directions to ensure that the trial of a case goes ahead quickly and efficiently.

Duties of the parties

1.8 The parties to a proceeding and their representatives must help the court to act in accordance with the overriding objective. They must avoid undue delay, expense and technicality and consider options for primary dispute resolution as early as possible.

....

Court may dispense with rules

1.14 A court may in the interests of justice dispense with compliance, or full compliance, with any of these rules at any time.

1.15 If, in a proceeding, the court gives a direction or makes an order that is inconsistent with any of these rules, the direction or order of the court prevails in that proceeding.

....

Amendment of statement of case

5.34 A party may amend a statement of case to:

- (a) better identify the issues between the parties; or
- (b) correct a mistake or defect; or
- (c) provide better facts about each issue.

5.35 The amendment may only be made with the leave of the court or the consent of the parties.

5.36 In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:

- (a) awarding costs; or
- (b) extending the time for anything to be done; or
- (c) adjourning the proceedings.

10. It is clear that the amendments were significant and required the respondents to substantially amend their defence and make further preparations for trial. It is also clear that some of amendments went beyond those set out in Rule 5.34. Yet we do not regard that fact as fatal to the decision. The Rules taken as a whole provide a structure within which civil cases are to be conducted. They facilitate the orderly running of a civil case, they do not and should not dictate to the extent that they prevent, for example, an amendment necessary to ensure the correct matters are before the court. Thus we do not agree that the Commissioner could not rely on the combination of Rule 5.34 and Rule 1.14 to accommodate the requested amendments.
11. We are further satisfied that in the absence of necessary time being allowed for preparation the respondents would be prejudiced but note the substantial additional time allowed for that preparation and the concession made on 26 March 2017 during the adjournment application that the respondents were given sufficient time for preparation. That the respondents did not, or were not able to, take advantage of that time is a different matter.

12. The remaining essence of this appeal concerns the application of two rules which are found in applicable precedents. In order to appreciate that essence further factual detail is necessary. The essential question relates to the new cause of action introduced by virtue of the amendment and the provisional amendment as regards the first appellant Mr Guo. That in turn requires consideration to be given to the applicable limitation period and that itself requires consideration of the applicable law, be that Solomon Islands law or Chinese law and following that, if Chinese law is applicable, whether that law merely restricts the right to bring a claim (i.e. is procedural) or whether that same law extinguishes the right (i.e. is substantive).
13. The relevant authorities are in that case *Weldon v Neal* (1887) 19 QBD 2 and *Phillips v Eyre* (1870) 6 L R QB 1. The effect of *Weldon v Neal* is that an amendment seeking to include a cause of action after the expiration of the limitation period should be refused. This requires consideration by the Commissioner of the relevant limitation period and that in turn requires consideration of *Phillips v Eyre*. Assuming Chinese law is applicable, it follows from what was said in *Phillips v Eyre* that Solomon Islands limitation law applies, unless the Chinese limitation law extinguished the right. The parties and the Commissioner proceeded on the basis that the court was bound by *Phillips v Eyre* and in that we do not dissent. The question raised on this appeal is whether this Court is prepared to find that *Phillips v Eyre* should no longer be followed.
14. Further to that question is at what stage in the substantive proceedings should that question, if still in issue, be determined? An interlocutory order can be challenged at any stage of the hearing, even on appeal from the final decision after trial where the interlocutory order affects the final decision. Thus this Court must also consider whether to consider the question of the continued applicability or otherwise of the *dicta* of *Phillips v Eyre* at this stage in the trial or after a full hearing and determination of the substantive claim.
15. That single matter disposes of a number of the grounds of appeal which seek to criticise the Commissioner and determinations of the applicable limitation period, its effect and not yet making determinations in relation to the provisional amendment.
16. Whether *Phillips v Eyre* remains good law, to continue to be applied in Solomon Islands as a pre-Independence authority from the common law, is a real question. It is no longer applicable in England and Wales following statutory amendment. It no longer applies in Canada or Australia. Indeed there is an authority from Australia which suggests the opposite result to that which would be obtained if *Phillips v Eyre* were still the law, to be found in *Mercantile Mutual Insurance (Australia) LTs v Neilson & Ors* [2004] WASCA 60 in which the Full Court found that the limitation period under Chinese law is substantive and not procedural.
17. The *Phillips and Eyre* question was not touched upon during the stay hearing before this Court in October 2016, which hearing took place prior to the reception of any evidence on the present claim after amendment. As the matter now stands the respondents have now led evidence on the amended claim. The appellants have filed an amended defence but have not filed evidence in accordance with directions made in late October 2016. The decisions necessary to confirm the provisionally admitted amendments have not yet been made.

18. Given that, this Court may, should it determine to answer the question posed at this stage, answer a question which is nothing more than hypothetical. The much amended claim may fail in its entirety or in part, thus making the question otiose. Questions still to be answered, following submissions on evidence not yet presented, may be answered in a way which makes consideration of the issue irrelevant. Finally determining now not to answer the question will not have the effect of disallowing the appellants to bring the same question if they so wish as part of an appeal following trial should the interlocutory order affect the final result. Authority for that proposition is found in *Gerlach v Clifton Bricks Pty Ltd.* (2002) 209 CLR 478.
19. The Commissioner was bound to follow *Phillips v Eyre* and so its application was not an issue raised before him. We are not so bound and so this Court is the only forum which could provide the Appellants with the relief from its application which they presently seek. Having considered the present state of the trial and its long and chequered history including, now, its fourth appearance in this Court on interlocutory matters, we conclude that the question is best left until other decisions are made in the trial which decisions we consider may materially affect the need to consider the question. We further consider that this is the most appropriate course given the present stage of the proceedings, the respondents having already led evidence on the amended claim and the appellants having had an adequate opportunity to lead their evidence and prepare accordingly.
20. For those reasons we do not grant leave in 27 of 2016 and turn to the application for leave to bring an appeal against the decision to refuse a further adjournment.
21. On 19 October 2016 the Commissioner made an order further adjourning the trial of this matter in the High Court and making directions for future conduct. This order followed, in time, a hearing in the Court of Appeal wherein it was noted that amendments to the originating claim had been allowed and time for preparation might be permitted to the other side.
22. The adjournment terms were agreed and the date for resumption of the trial fixed by consent. Other orders dealt with filing of amended defences, counterclaims and evidence. The order made was:-

“The continuation of the trial is adjourned to re-commence on 27 March 2017 February 2017 [sic] for a period of 12 weeks.

The Claimants have leave to file and serve any further amended claim on or before 4 p.m. on Friday, 28 October 2016.

The First, Third and Fifth Defendants have leave to file and serve any further amended defences on or before 4 p.m. on Friday, 25 November 2016.

The Second Defendant has leave to file and serve any further amended defence and counterclaim on or before 4 p.m. on Friday, 25 November 2016.

The Claimants have leave to file and serve amended replies and/or an amended reply and answer on or before 4 p.m. on Friday, 9 December 2016.

The Claimants shall file and serve an amended Court Book incorporating the latest pleadings as at 9 December 2016 on or before 4 p.m. on Friday, 16 December 2016.

Save with the leave of the Court, the pleadings contained in that amended Court Book shall be the pleadings on which the trial shall proceed.

The Defendants shall serve any further witness statements upon which they intend to rely at trial on or before Friday, 20 January 2017 and shall file the same with [sic] 7 days thereafter. Unless a defendant serves any such witness statement by that time no witnesses, other than those for whom witness statements have already been filed, will be able to be called by that Defendant without the leave of the Court.

The First and Second Defendants shall serve their responses to the Claimants' Amended Schedule of Monetary Claims on or before Friday, 25 November 2016 and shall file the same with [sic] 7 days thereafter. Unless a Defendant serves a response by that time, the items in that schedule shall be deemed to be admitted by that Defendant as to quantum.

The Claimants shall provide a schedule of any objections to any further witness statements filed by the Defendants pursuant to paragraph 8 hereof on or before 4 p.m. on Friday, 3 February 2017.

The Second Defendant shall prepare and deliver to the Claimants an itemised schedule of its monetary counterclaim (with references to the pleadings, documentary evidence and witness statements) ("Second Defendant's Schedule") on or before 4 p.m. on Friday, 20 January 2017.

Any interlocutory applications in relation to the trial, which it is proposed be dealt with in 2016, together with any supporting sworn statements, shall be filed in accordance with the rules and served on or before 4 p.m. on Friday, 28 October 2016.

Any statements in response to any such interlocutory applications shall be filed and served on or before 4 p.m. on Tuesday, 8 November 2016.

The scheduled dates for the evidence of Professor Ling are vacated and new dates shall be allocated at the trial conference.

The parties have leave to deliver any further questions as to Chinese Law to Professor Ling by Friday, 16 December 2016, such questions to be served on the other parties and filed with the Court.

Should the parties raise any further questions for consideration of Professor Ling, he shall be requested to provide these answers in writing by way of a supplementary report by Friday, 24 February 2017.

The Claimants shall file and serve any witness statements in reply on or before 4 p.m. on Friday, 24 February 2017.

The Claimants shall file and serve their response to the Second Defendant's schedule on or before 4 p.m. on Friday, 24 February 2017.

The Defendants shall provide a schedule of any objections to any witness statements in reply filed by the Claimants pursuant to paragraph 18 hereof on or before 4 p.m. on Friday, 10 March 2017 and any such objections and any objections under paragraph 10 shall be determined at the re-commencement of the trial or, if possible, at some earlier convenient time.

The requirement to provide notices of cross examination of witnesses is dispensed with and it shall be assumed that the deponents of all witness statements shall be required for cross-examination.

Communications with the Court shall be by solicitors on the record through the Registrar with copies to all other parties.

Counsel may communicate directly with the Commissioner by email with a copy to the Registrar and other counsel provided that they have first consulted as to the proposed communication with other relevant counsel.

Solicitors and/or junior counsel for the Claimants are authorised to communicate with Professor Ling, the Institute of Modern Languages, interpreters and the DAAT's transcription service on logistic and non-substantive matters pertaining to the Order and the trial.

The solicitors for the Claimants and Second Defendant shall consult in good faith as to the costs and expenses budget for Professor Ling, the interpreters and the DATS transcription service with a view to agreeing any further contributions to be made to joint trust account established for that purpose and the default of agreement the matter shall be determined by email application to the Court.

Paragraph 1 of the Order of 26 September 2016 (perfected 27 September 2016) is varied by deleting the same and inserting the following in lieu thereof –

Leave is granted to the Claimants to further amend its claim and statement of case in accordance with the draft further amended claim handed up to the Court on the 21st of September 2016 save that the amendments are admitted only provisionally pending further consideration at the end of the trial.”

That any further amendments made to the claim and the counterclaim pursuant to paragraphs 2 and 4 of this Order are also admitted only provisionally pending further consideration at the end of the trial.

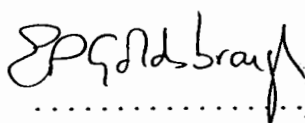
Liberty to apply on 5 business days’ written notice.

Costs of and incidental to the application shall be costs in the cause.

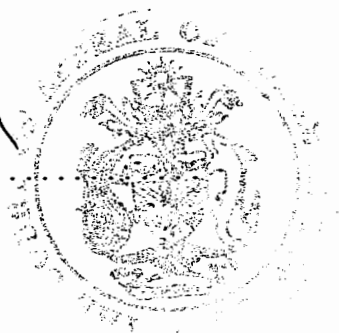
23. The purpose of setting out in full the orders made in September 2016 is to illustrate that it was not simply an adjournment ordered on that date. Comprehensive directions were made to facilitate the trial. Such an order is in line with the obligation imposed by the Civil Procedure Rules to ensure that trials proceed justly with the minimum delay and expense.
24. The request to adjourn the trial was made to the Commissioner on the first day of the resumed trial. Counsel instructed for the Appellants was instructed for the limited purpose of making the application to adjourn. Following the making of the application counsel for the Appellants sought and obtained leave to withdraw and following that the Appellants were not represented at the resumed trial.
25. It is conceded at this hearing that the only direction from the above order complied with by the Appellants was the filing of an amended defence, no other provision having been met. In practice this indicates that, in the absence of leave being sought and granted by the Commissioner, there is no evidence to be led by the Appellants at trial.
26. The sole reason put forward by the Appellants to the Commissioner and this Court for this default is shortage of funds. There is no complaint that sufficient time had not

been allowed for compliance. That argument would have been difficult to sustain in any event given the consensual nature of the order made.

27. It is submitted that the funding shortage resulted from delay in the Appellants ability to raise a mortgage on the property the subject matter of this claim. That delay, in part, was caused by a delay in obtaining the requisite consents to any mortgage.
28. This is discussed in the reasons for the decision not to adjourn which form part of the appeal book although the decision has not yet been published as a separate judgment. Beginning at page 231 of the Appeal Book Part B Volume 1. It is further considered in the reasons published by Mr. Justice Young sitting as a single judge of the Court of Appeal on 10 April 2017 given on 11 April 2017 when determining an application for stay of these proceedings based on the same notice of application for leave now under consideration.
29. The Commissioner indicates in his reasons that he is not satisfied with the evidence supporting the submission that the Appellants are, or were not, in a position to fund these proceedings nor was he satisfied that an adjournment would necessarily place the Appellants in any better financial position. He explains in detail why he arrived at those conclusions. His reasons conclude at page 240 of the appeal book with a reference to the overriding objective set out in the preamble to the Civil Procedure Rules of 2007. He notes that a further adjournment of the proceedings would not be just in the circumstances.
30. We do not disagree with the findings of the Commissioner. His assessment of the material put before him is, in our view, without fault. The test which he has applied in reaching his conclusion on the material is, again, without fault.
31. Given those conclusions we do not consider that leave should be granted to bring an appeal against the decision to refuse a further adjournment. The matter received proper consideration when it was brought before the Commissioner, his findings on the limited evidence put before him are correct, there is no consideration of material not relevant to the application nor has it been shown, or even attempted to be shown, before us that an incorrect principle has been applied or correct principle misapplied.
32. The application for leave is dismissed.
33. Costs of both the applications are ordered against the Appellants in favour of the Respondents to the applications such costs to include certification for overseas counsel as requested. Costs are to be agreed or assessed.



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Goldsbrough P



G Ward



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Ward JA

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Wilson JA