IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0036 OF 1993S
(High Court Civil Action No. 50 of 1985)

BETWEEN

SURENDRA PRAKASH t/a ROBINA TAILORING CENTRE — APPLICANT

-and-

RANGITIKEI PRODUCE DISTRIBUTORS LIMITED — RESPONDENT

Mr D. Sharma for the Applicant
Mr S. Parshotam for the Respondent

Date and Place of Hearing : 1st March, 1995. Suva
Date of Delivery of Judgment : 2nd March, 1995

JUDGMENT OF THE COURT

On 20 September 1993 the applicant applied for leave to appeal against refusal by a Judge of the High Court in Chambers to grant him leave to amend his pleadings and also against refusal to grant a stay of execution of judgment already entered. The application was heard by Tikaram J.A.(as he then was). He dismissed both applications with costs. The powers of the Court were exercisable by a single judge under s.20 of the Court of Appeal Act (Cap.12).

On 26 July 1994 the applicant applied to have the matter determined by the Court as duly constituted for the hearing and determining of appeals. The notice of motion containing the application stated grounds of the application which had not been stated in the application made in September 1993. The application was re-lodged as an amended notice of motion for leave to appeal on 2 December 1994. It is to be noted, however, that the grounds were stated in terms of an error or errors alleged to have been made by Tikaram J.A., not errors made by the Judge in the High Court, as should have been alleged. However, it is convenient to set the grounds out, as clearly they state

what the applicant alleges was wrong with the decision made by the judge in the High Court, which is the matter with which we are concerned in this application.

The grounds stated in the amended notice of motion are as follows:

> *"(a) THAT the learned Justice of Appeal was wrong in refusing the applicant/appellant application for leave to appeal against the order, decision or ruling of the High Court Judge at Lautoka on an application by the applicant for leave to amend his defence and counterclaim on the grounds:-*
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> *(i) THAT the summary Judgment entered against the applicant/appellant and dismissal of his appeal thereon did not affect or exhaust his defence and counterclaim (as the defence is very closely linked with his counterclaim and action was treated alive (sic). The applicant/appellant ought to have been granted leave to appeal so that he could amend his counterclaim.*
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> *(ii) THAT the learned Justice of Appeal ought to have considered that having regard to the act, fact and circumstance raised by the appellant the summary Judgment was only an interlocutory ruling, the appellant's defence and counterclaim were kept alive, interest of Justice required that the appellant do have leave to appeal to amend his pleadings."*

Before we consider the application now before us, it is necessary to refer to the nature of the claim in the High Court made by the respondent to the fact that summary judgment was entered on that claim and to the fact that the applicant appealed against the summary judgment. The claim was for payment of two amounts of money in New Zealand currency in respect of two bills of exchange issued by the applicant, who was the defendant in the High Court. The bills of exchange had been issued to pay for a quantity of onions and potatoes supplied to the applicant by the respondent. The applicant filed his Statement of Defence in the High Court denying liability and seeking to rely upon the defence of absence of merchantable quality. He also counterclaimed on

the basis that the goods had arrived in a damaged and deteriorated condition. Judgment was entered under O.14, on the basis that the claim was established and there was no defence to it. The applicant appealed against the judgment but the Court of Appeal held that the High Court had been correct in deciding that the applicant had raised no defence. It noted that there was no suggestion that there had been a total failure of consideration. Accordingly it dismissed the applicant's appeal with costs. The judgment in respect of the appeal was delivered on 19 March 1992.

The applicant then applied to the High Court for a stay of execution of the judgment on the respondent's claim until the Counterclaim had been decided. The High Court granted a stay, not in those terms but until further order; subsequently it discharged the stay order. On 21 July 1993 the applicant applied in the High Court for leave to amend his Statement of Defence and his Counterclaim. He sought to have them amended in a number of respects including stating remedies which he claimed in the following terms:

> *"(a) Declaration that he is not liable to pay to the Plaintiff;*
> *(b) That judgment entered summarily be stayed;*
> *(c) Damages;*
> *(d) Costs."*

In the original Counterclaim the applicant had claimed damages for loss of profit and costs. That claim remained unchanged in the amended Counterclaim.

On 30 July 1993 Ashton-Lewis J. dismissed the applicant's motion of 21 July 1993 by which the applicant sought leave to amend the Defence and Counterclaim and a stay of execution of the judgment already entered in respect of the respondent's claim; he made no order as to costs. His Lordship's order was sealed on 4 August 1993. There can be no doubt that it was an interlocutory order and consequently, by reason of r.16(a) of the Court of Appeal Rules, the notice of appeal from it should have been filed within 21 days of 4 August 1993. Even if r.16(b) had been

applicable, the date on which the notice of appeal was filed was one day after the expiration of the period of six weeks from 4 August. The applicant should, therefore, have applied to the Court to extend the time within which an application for leave to appeal might be made. We pointed this out to Mr Sharma but he informed us that he had no instructions from the applicant's solicitor except to rely on written submissions in support of the application for leave which the solicitor had already filed in court. No application was made, therefore, for an extension of time within which to file and serve the application for leave to appeal against Ashton-Lewis J.'s order. Consequently, we must dismiss the application on the ground that it was not filed and served within the period allowed by r.16.

If application had been made for the time to be extended, we should not have been willing to grant it. It was clear from what Mr Sharma told us that the only submission which would have been made in respect of the merits of the application was the written submission filed by the applicant's solicitor. Having considered that submission, we are satisfied that the application could not succeed.

Order 15 r.2(3) provides:-

> *"(3) a counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed."*

Entry of summary judgment in favour of the respondent in respect of its claim did not, therefore, prevent the applicant proceeding with his Counterclaim. The effect of the entry of summary judgment is that the proceedings in respect of the respondent's claim have been concluded. The applicant cannot, therefore, now amend his Statement of Defence. On the other hand, the Counterclaim is still on foot; nothing said by this Court when it dealt with the appeal against the entry of summary judgment affected that situation. While the Counterclaim is still on foot, it can be appropriately amended; but as the pleadings were

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closed long ago (as to which see O.18 r.19), it can be amended only with the leave of the High Court (as to which see O.20 rr.3&5). However, the amendments sought by the applicant were not such as could properly be included in it after the proceedings in respect of the respondent's claim had been concluded. They were merely a way of seeking to present a defence to the respondent's claim. A Counterclaim must be of such a nature that the court would have jurisdiction to entertain it as a separate action (**Amon v. Bobbett** (1889) 22 Q.B.D.543 at 547-548). Consequently, in our view, if leave were granted to extend the time for filing the application for leave to appeal against Ashton-Lewis J.'s order, the appeal in respect of the refusal to permit amendment of the Defence and Counterclaim could not succeed.

So far as the appeal, if leave to appeal were granted, would relate to the refusal to grant stay of execution of the judgment obtained by the plaintiff, it is to be noted that the judgment was obtained in 1985. The applicant has had 10 years in which to pursue his Counterclaim but has allowed the matter to drag on from year to year without doing so effectively. In those circumstances, even if an extension of time for filing the application for leave to appeal were granted, the application would, in our view, necessarily be unsuccessful.

On the hearing of the application for leave to appeal against Ashton-Lewis J.'s order, and after counsel had been heard, the decision of the Court to refuse leave to proceed out of time was announced. We undertook to state our reasons in writing and those reasons are set out above.

Sir Peter Quilliam
Judge of Appeal

Mr Justice Ian R. Thompson
Judge of Appeal

Mr Justice J.D. Dillon
Judge of Appeal