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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. Misc 6/06
(High Court Civil Action No. HBC 394/1999L)

BETWEEN:

WOODSTOCK HOMES (FIJI) LIMITED

Applicant

AND

SASHI KANT RAJESH

(f/n Mariappa)

Respondent

Counsel: **S. Maharaj for the Appellant**
S. Parshotam for the Respondent

DECISION

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[1] On 22 October 1999 the Respondent issued a writ seeking damages for personal injuries which he claimed to have sustained on 6 August 1997 while employed by the Applicant as a carpenter.

[2] On 18 November 1999 judgment in default of notice to defend was given against the Applicant. According to the papers, an affidavit of service complying with RHC O 13 r8 (b) was filed, but I was not shown a copy.

[3] On 7 March 2001 the Applicant filed an application in the High Court to set aside the judgment in default. Owing to the severe delays in the disposal of business in the High Court at Lautoka, the application did not come on for hearing until over five years later, on 28 March 2006. On 31 March 2006 it was dismissed.

[4] This is an application for leave to appeal against the High Court's refusal to set aside the judgment in default.

[5] This application is one of several pending applications which give rise to the same question: was the decision against which it is desired to appeal interlocutory or final? If final, then leave to appeal is not required. If interlocutory, then leave must be obtained either from the High Court or from the Court of Appeal (see Court of Appeal Act - Cap. 12 - Section 12 (2) (f) and rule 26 (3) of the Court of Appeal Rules. Where application is made to the Court of Appeal, leave may be granted (or refused) by a single justice of appeal (see Court of Appeal Act - section 20 (1) (a)). With the replacement of the former Section 20 by the Court of Appeal (Amendment) Act 19/1998, there is now no right to have the decision of a single justice re-determined by the full court and therefore the single justice's decision is final.

[6] Unfortunately, the Court of Appeal has, on different occasions, taken two distinct and incompatible approaches to the question. The first approach, "the application approach" was taken by the court in Suresh Charan v. Shah (1995) 41 FLR 65. That approach is also taken in England and Wales (see White v.

Brunton [1984] QB 570; [1984] 2 All ER 606) and seems to be consistent with rule 7 (a) of our own Court of Appeal rules. A useful guide to the application of the approach can be found at Order 59 rule 1A of the 1991 White Book.

[7] The second approach is known as "the order approach". It was preferred by a differently constituted bench of the full court in Jetpatcher Works (Fiji) Ltd. V. Permanent Secretary for Works and Energy ABU 63/03 – FCA B/V 04/213).

[8] The co-existence of the two approaches is now causing some difficulty. The present case illustrates the problem. On the "application approach" an order refusing to set aside another order (whether such other order is final or interlocutory) is itself interlocutory and therefore leave to appeal it is required (see O. 59 r 1A (6) (bb) of the English Supreme Court Rules). On the "Order approach" however an order refusing to set aside a judgment in default of notice to defend would, in the absence of a successful appeal, bring an action to an end. Therefore no leave to appeal such an order is required.

[9] When the present application came before me on 25 May I indicated that the whole question of which approach the court would in future take was to be considered in an appeal then pending before the court and listed for hearing in its July sessions. Unfortunately, the appeal in question was adjourned and therefore the question is yet to be answered. In these circumstances, and after discussion with the President of the Court, it has been decided, pending a full court decision, to grant

leave wherever leave would not be required if the order approach were to be adopted. This purely temporary measure is of course, quite without prejudice to the merits or otherwise of the appeal.

[10] Leave is given to the Applicant to appeal against the judgment of the High Court at Lautoka delivered on 31 March 2006. In view of the very serious delays which have occurred in this case since the writ was issued every effort should be made to have the appeal ready for hearing in the November sessions of the Court.

FIJI COURT OF APPEAL

M.D. Scott
Resident Justice of Appeal

1 August 2006