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

CIVIL APPEAL NO. ABU0003 OF 2004S
(High Court Civil Action No. HBC 329 of 1998S)

BETWEEN: PETER IAN KNIGHT

Appellant

AND: DONALD ROSS AND ROBERT REILLY

First Respondents

AND: AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

Second Respondent

Coram: Ward, President
Barker, JA

Hearing: Monday, 23rd October 2006, Suva
Tuesday, 27th November 2006, Suva
[Before Ward, P only]

Counsel: Appellant in Person
D. Sharma for the First Respondents
H. Nagin for the Second Respondent

Date of Judgment: Friday, 9th March 2007, Suva

RULING OF THE COURT

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[1] On 26 November 2004, this Court (Ward P, Barker and Tompkins JJA) delivered judgment in this appeal. Essentially, the Court upheld the judgment for damages awarded in the High Court in favour of the first respondents against the appellant based on solicitor's negligence.

[2] This Court however varied the judgment of the High Court which had assessed the liability of the appellant and the second respondent as equal. This Court held that the proper apportionment of liability was 75% on the part of the appellant and 25% on behalf of the second respondent.

[3] In the formal judgment of the Court, orders for the costs in this Court were made which endeavoured to reflect the respective outcomes for all parties on the appeal. Unfortunately, through an oversight, no order was made regarding the costs awarded to the first respondents in the High Court. They had been successful in both Courts. The High Court had ordered costs in favour of the first respondents ***"to be taxed if not agreed."***

[4] An application had been filed by the first respondents in the High Court in October 2005 for a ruling on whether this Court intended the first respondents to be entitled to the costs awarded in their favour in the High Court. The parties argued this application before Coventry J on 27 March 2006. Not surprisingly, the Judge ruled, on 31 March 2006 that he had no jurisdiction to deal with the matter and that the first respondents should apply to this Court for a ruling. We are at a loss to know why, when there was no agreement on whether the first respondents were entitled to the costs awarded in the High Court, a simple memorandum had not been filed in this Court seeking a ruling.

[5] On 25 September 2006, the first respondents filed a motion in this court seeking the court's clarification as to whether they were entitled to receive the costs awarded to them in the High Court.

[6] On 27 November 2006, Ward P, sitting as a single Judge of this Court, heard the application. He advised counsel that Barker JA was sitting at the next sessions of the Court. Since Ward P and Barker JA had been two members of the Court which had given the unanimous judgment on 26 November 2004, counsel agreed that it was

sensible to await Barker JA's arrival and for Ward P and Barker JA to rule on what was this Court's intention in respect of the first respondents' costs in the High Court.

[7] Accordingly, the Court, sitting with two Judges, gives this clarification of its earlier judgment. The President of the Court is of the opinion that it is impracticable to summon a Court of three judges for this application. (See 56(2) of the Court of Appeal Act (Cap.12)). Tompkins, JA, the other member of the Court in November 2004, has now retired as a Judge of this Court.

[8] The jurisdiction of the Court to rectify accidental steps or omissions is found in the English Rule 20.11.1 which provides:

> ***"Clerical mistakes in judgments or orders, or errors arising from any accidental slip or omission may at any time be corrected by the Court on motion or summons without an appeal."***

This English Rule is applicable because there is no apposite rule in the Fiji Court of Appeal Rules. Under Rule 7 of those Rules, the current practice and procedure of the English Court of Appeal applies when there is no appropriate provision in the Fiji Rules.

[9] Counsel on 27 November 2006 referred Ward P to the relevant commentary on the above-quoted rule in the White Book. We are satisfied that rectification of the Court's omission to deal with the first respondents' costs in the High Court comes within the jurisdiction conferred by the Rule. The Rule applies where there was an accidental omission, as occurred here. The omission failed to express the Court's manifest intention.

[10] We have no doubt that the first respondents are entitled to the costs awarded to them in the High Court. There was no reason for this Court to have denied them these costs. They had succeeded both in this Court and in the High Court. There was no conduct on their part which would justify any diminution in their

entitlement to costs in the High Court. Most of the argument at the appeal hearing concerned the respective liabilities of the appellant and the second respondent for the first respondents' loss.

[11] The only change needing to be made to the costs order made by the High Court is that the costs ordered to be paid by the High Court to the first respondents should now be paid as to 75% by the appellant and 25% by the second respondent. That must be because of the decision of this Court varying the contributions of those parties to the first respondents' loss.

[12] Although we regret the oversight by the Court in not addressing the first respondents' High Court costs in the judgment, we should have thought that the Court's intention in that regard was tolerably clear. We wonder why counsel could not have sorted the matter out without making an application to the High Court which was bound to fail, plus a further contested application to this Court.

[13] The judgment of the Court of 26 November 2005 is varied by adding a further order as section (f) on page 23. ***"The costs awarded to the second respondents in the High Court will stand, save that those costs, as taxed, are to be paid as to 75% by the appellant and 25% by the first respondent."***

[14] We make no order as to the costs of this application.

FIJI COURT OF APPEAL

Ward, President

Barker, JA

Solicitors:

Appellant in Person
R Patel and Company, Suva for the First Respondents
Sherani and Company, Suva for the Second Respondent