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

**MISCELLANEOUS CASE NO. 6 OF 2007**
(High Court Action No. HBC 49 of 1999L)

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| **BETWEEN:** | **VIJENDRA DUTT SHARMA** | ***Appellant*** |
| **A N D :** | **NATIONAL INSURANCE COMPANY LIMITED** | ***Respondent*** |

**Hearing:** 17 May 2007
**Ruling:** 25 May 2007

**Counsel:** **S Sahu Khan for applicant**
**A K Narayan for respondent**

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## RULING

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[1] This is an application for leave to appeal out of time against a decision of Finnigan J on 15 July 2005, sealed on 27 July 2005, in which he struck out the applicant's claim. This application for leave was filed on 12 March 2007.

[2] The original claim had been commenced by writ issued on 12 February 1999. On 22 March the same year, the defendant, the present respondent, filed an application for security for costs as the plaintiff had given an address in Canada. On 30 April 1999, the court ordered the plaintiff to file an affidavit in reply and stayed further steps in the action until that was done. No affidavit was filed and so, on 23 December 1999, the defendant filed an application to dismiss the action under O18 r18.

[3] It is not apparent on the papers before me whether the required affidavit was ever filed. Clearly nothing else happened until a general call-over in May 2005 following which Finnigan J listed both applications for hearing on 16 June 2005. At that hearing the plaintiff was represented by Mr G P Shankar although counsel did not appear personally and simply arranged for written submissions to be handed to the court.

[4] Mr Shankar died on 16 April 2006. The affidavits before the Court state that his files were managed by Chandra Singh and Associates and that firm placed an advertisement in the Fiji Times of 17 May 2006 advising all clients of Mr Shankar to collect their files from its office.

[5] When considering an application for leave to appeal out of time, the court must consider the length of the delay and the reasons for it, the merits of the appeal and the degree of prejudice to the parties should the application be granted or refused. Once the time for appealing has passed, the burden is on the applicant to satisfy the Court, that in all the circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal: *Avery v No 2 Public Service Appeal Board and others* [1973] 2NZLR 86,91.

[6] The delay of sixteen months in this case was considerable. The applicant explains in an affidavit sworn on 6 March 2007:

> "4. I have been making various enquiries of late Mr G P Shankar's office as to the status of the appellant's case in the High Court but always used to be informed that the decision was awaited.
> 5. The enquiries continued even after Mr G P Shankar's death and I even asked for the file but the only clerk in the office informed me that she could not say or do anything until the Probate of Mr G P Shankar was out and that she would certainly let me know when the Probate is out.
> 6. We did not hear anything from the said office after waiting for all the time as we do not have knowledge of legal formalities and procedure and then we approached Messrs Sahu Khan and Sahu Khan and they got the file out from the office of late Mr G P Shankar only two weeks ago and it was only then that we

discovered that judgment was given by Justice Finnigan on 15th day of July 2005 ..."

[7] The respondent filed an affidavit by a former employee of Mr Shankar suggesting that the appellant had been to the office and had been told of Finnigan J's decision before Mr Shankar's death. The applicant explained in a further affidavit that he never saw the notice in the newspaper and asserts that he did everything possible to receive information as to the court action from Mr Shankar's office.

[8] Mr Sahu Khan, for the applicant, urges the Court on the strength of those affidavits to consider this as akin to a case where the time of appealing has expired because of the fault of a legal adviser. He cites *Kenneth John Hart v Air Pacific Limited*, Civil Appeal No 23/83; delivered in July 1984 in which this Court referred to the earlier cases of *Gatti v Shoosmith* [1939] Ch 841 and *Lange and others v Town and Country Planning Appeal Board and others* [1967] NZLR 615 and concluded:

> *'The cases show that a mistake on the part of a legal adviser can provide sufficient cause to justify the Court in exercising its discretion to grant leave."*

[9] The court in *Kenneth John Hart* also pointed out that it was suggested in *Gatti's case*, that the merits of the case and the likelihood of a successful appeal were not matters of concern in applications for leave to appeal out of time. However, this Court's acceptance of *Avery's case*, as applied frequently since, requires the Court to consider such matters.

[10] At p92 in Avery's case, Richmond J stated:

> *"..This was a case of a solicitor's error resulting in a short period of delay after the expiration of the ordinary time for appealing. That delay, [counsel] said, had not prejudiced anybody. No doubt there may be many cases where this type of argument might prevail on the Court to grant leave. Clearly however the Court is not restricted to such considerations. ... Everything is left to the discretion of the Court on the wide basis*

> *that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need for the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved."*

[11] McCarthy J, in the same case, pointed out:

> *"... the court has to rule in accordance with the dictates of justice, justice not only as it affects the applicant but also as it affects other parties."*

[12] Counsel for the respondent refers to the delay by the applicant throughout the time the case had been before the courts. However, Finnigan J specifically removed any culpability for that delay from the plaintiff:

> "Finally, while I take no account of delay because some of the delay in this matter since the year 2000 has been caused in the court, nonetheless for his part the plaintiff in pursuit of his claim has been at best desultory."

[13] I am not satisfied that the account given by the applicant of his efforts to ascertain the position of the case either before or after Mr Shankar's death is sufficient to discharge the burden placed upon him. No attempt has been made to give details of the method of contact with Mr Shankar's office, the frequency or the period over which they were made. No evidence has been offered from anyone to confirm such enquiries. Neither, it must be said, is there any explanation of the manner in which, or the person from whom, two weeks before the application was filed, it was possible to obtain the papers from Mr Shankar's office.

[14] My conclusion about the delay, together with the prejudice to the respondent, to which I refer below, are sufficient to determine this application but in deference to the carefully prepared submissions of counsel in respect of the merits of the appeal, I pass briefly to deal with that.

[15] The application in the High Court to strike out was brought under O18 r18 on the grounds that it was frivolous, vexatious and an abuse of the process of the court. A number of affidavits were submitted to the court and it is clear from the judgment that they contain many disputed issues.

[16] The learned judge acknowledged that it should be 'a rare thing for an application (sic) to be dismissed without a hearing'. He then considered the facts of the case as revealed in the various affidavits and later stated:

> "I accept that under Order 18 rule 18 (1) of the High Court Rules this summary process should be exercised in a defendant's favour only in plain and obvious cases. It is for claims which are on their face "obviously unsustainable". ... The statement of claim itself is admirably brief ... what undermines it is the evidence in the affidavits. Before going further I remind myself of the principles stated clearly in *Wenlock v Moloney and others* [1965] 2AllER 871. I am aware that at this stage the Court must not succumb to the temptation to try the substantive issues on the untested affidavits. Ultimately the test for me is whether "what was originally a maintainable action ... [has become] inevitably doomed to failure".'

[17] He again refers to the plaintiff's affidavits and continues:

> "After reading those affidavits and after considering them for some time I felt bound to uphold the submissions of counsel for the defendant."

[18] There is then an account of the contents of the affidavits and his assessment of the truth of those contents. He concludes:

> "I am satisfied that this is one of those rare cases where an apparently maintainable action is inevitably doomed to failure. I therefore strike it out."

[19] The basis of the appeal is that the judge was wrong to determine the application on the strength of untested affidavits and to assess their credibility. I accept that those grounds would have a reasonable chance of success.

[20] It is perhaps worthy of note that the power under O18 r18 is to strike out the pleadings and, if that is done, there is a further discretion to stay or dismiss the action or to enter judgment accordingly. The judge's order to strike out would only have applied to the pleadings and the correct order would have been to stay or dismiss the action.

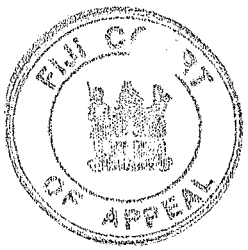
[21] I have already indicated that I do not accept the reasons given are sufficient to justify a delay of this length. However, in order to determine the adequacy of the reasons for the delay and its length, I also considered the prejudice to the respondent if the appeal should be allowed and the case sent for trial and to the applicant if it was not.

[22] The delay in filing for leave is over a year and, together with the plaintiff's conduct of the action prior to the hearing in June 2005, means that evidence would need to be called about events in March 1998. The respondent has filed an affidavit which sets out the accounting consequences to the respondent company of re-opening a case after so many years and also to the difficulties that are already apparent over the attendance of witnesses.

[23] The respondent has done nothing to cause the delays either before or after the judgment of Finnigan J. I consider that the prejudice to them would be considerable. Clearly the applicant is also prejudiced if his application is refused but, as I have indicated, that is entirely the result of his own inaction.

[24] I am satisfied that the overall justice of the case means this application must fail.

[25] The application for leave to appeal out of time is refused with costs to the respondent of $300.00.



**Gordon Ward**
**PRESIDENT**