IN THE COURT OF APPEAL FIJI ISLANDS

AT SUVA

(Misc Action No. 002 of 2009)

[On appeal from the Judgment of the High Court of Fiji at Suva in Civil Action no. HBC 200 of 2008S]

BETWEEN : **ATAMA BECI, NAIBUKA SEDUADUA, MARICA KARIKARITU, TEVITA BOLA AND AISEA KOROVOU**

APPLICANTS (ORIGINAL PLAINTIFFS)

AND : **JONETANI KAUKIMOCE, SAMUELA LALIQAVOKA, SEVANAIA DAKAICA, ERONI RAIKOTI AND AKUILA BALE**

RESPONDENTS (ORIGINAL DEFENDANTS)

BEFORE THE HON. PRESIDENT : **HON. JUSTICE JOHN E. BYRNE**

COUNSEL : **S. VALENITABUA for the APPLICANTS**

: **J. SLOAN and A. VULAONO for the RESPONDENTS**

DATE OF HEARING AND SUBMISSIONS: **4th August, 10th September, 2nd November 2009**

DATE OF RULING : **20th January 2010**

RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

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[1] "All that glitters is not gold" - so runs the early thirteenth century proverb. Its more recent equivalent is the early 20th century saying:"You can't tell a book by its cover".

[2] For the purposes of the law, this application for leave to appeal out of time raises yet again the question: "When is a judgment interlocutory or final?" There has been much law on this question and during this ruling I will refer to only some of it.

[3] The ruling is on a Summons issued by the Applicants on the 22nd of July 2009 seeking an order:

> that the applicants be granted leave to appeal out of time against an interlocutory Ruling given by Hickie, J in the High Court on the 27th of November 2008 in which the Learned Judge ordered that the applicants' (Plaintiffs') Originating Summons dated the 19th of June 2008 be struck out and that the applicants pay the respondents' costs of the originating summons.

[4] Hickie, J called his ruling interlocutory but the applicants argue that it was really final. The question is important because if it were interlocutory the time limit for appealing to this Court was 21 days from the 27th of November 2008. If it were final, then the time limit would be six weeks from the 27th of November 2008.

[5] In their Summons before Hickie, J the applicants sought a declaration that they were at all relevant times the duly elected directors of GAUNAVOU INVESTMENTS COMPANY LIMITED (GICL) with effect from 7th July 2007.

[6] In addition the applicants sought a Declaration that the respondents were never elected Directors of the GICL at any time from the 7th of July 2007. They also

sought orders that the respondents whether by themselves or their servants or agents surrender all books, stationeries, equipments and all other assets of GICL to the applicants to operate the company until the next Directors were duly elected under the provisions of the Articles of Association of GICL and the Companies Act Cap. 247.

[7] The third relief which the applicants' sought was that the respondents be restrained from interfering with the applicants' operation management and the administration of GICL until the next Directors were duly elected under the provisions of the Articles of Associations of GICL and the Companies Act, Cap. 247.

THE QUESTIONS OF LAW INVOLVED

[8] The application raises two questions of law, first under what circumstances can an action be struck out and secondly "What rights do the applicants have in respect of a wrong alleged to be done to a company or does only the company itself have the right to litigate such a question?. This as the learned Judge recognized raises for consideration of the Court the rule in *Foss v. Harbottle* (1843), 2 HARE 461 and the later decision of the House of Lords in *Ashbury Carriage and Iron Company v. Riche (1875), L.R.7 H.L. 653,* both of which have, over the years come in for a fair share of criticism.

WHAT IS A FINAL JUDGMENT?

[9] In my ruling in Criminal Appeal No. AAU 0094 of 2007, Seth Rizwan Ali v. The State delivered on the 12th of May 2008 I cited the words of *Alverstone C.J in Bozsom v. Altrincham Urban District Council (1903) 1 KB 547 at pp 548 -549:*

> **"It seems so me that the real test for determining this question ought to be this:**

"Does the judgment or Order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order".

[10] Despite the wealth of case law on this question, in my judgment the remarks of Alverstone C.J are as good a practical guide to this question as can be found.

[11] Was the Ruling of Hickie, J interlocutory, the title he gave to it, or final considering the findings that the Judge made which were :

(a) that the applicants had no reasonable cause of action;

(b) that the action was an abuse of the Court process and was embarrassing;

(c) that the action was frivolous and vexatious and;

(d) that the action be struck out.

[12] I am assisted in answering this question by the decision of this Court in *Vimal Raj Goundar v. Minister of Health (2008) ABU 0075 of 2006S* that a strike out order is interlocutory one and thus any appeal to the Court of Appeal from such an order requires the leave of the Court of Appeal. Earlier the English Court of Appeal in *Hunt v. Allied Bakeries Ltd (1956) 3 ALL E.R. 513* had reached a similar decision.

[13] Consequently in my judgment the time for appealing in this case was 21 days from the date of Hickie, J's ruling namely 18th December 2008. If the legal vacation is to be considered, in this case it was from the 13th of December 2008 to 15th January 2009, then the applicants should have filed their notice of appeal by 21st January 2009.

[14] In *Gatti v. Shoosmith (1939) 3 ALL.E.R 916*, owing to a misreading of the relevant rule, the applicant was a few days too late in entering an appeal. The intention to appeal had been notified to the respondent's Solicitors, by letter sent within the time specified by the rule. The applicant asked that the time might be extended on the ground that the failure to enter the appeal within the time limited was due to the mistake of a legal adviser. It was held by the Court of Appeal that there was nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter should be so treated must depend on the facts of each case. On the facts of this case the court held the discretion to extend time ought to be exercised and leave to appeal was given.

[15] The applicants' application to seek leave to appeal out of time was received by the Court of Appeal Registry on 19th February 2009 which is at least one month outside the prescribed period and nearly 2 months from the date of the interlocutory order.

THE REASONS FOR THE DELAY

[16] Two reasons were given by the applicants:

(a) Their solicitor assumed that the ruling of Hickie, J was a final judgment and not an interlocutory Order, therefore calculating the period of appeal to be six weeks;

(b) that the applicants' solicitor was unaware of this Court's interpretation of Section 16 of the Court of Appeal Rules in *Raj v. Shell Fiji Limited* given on the 9th of May 2008. The court there, which consisted of Hickie, JA and myself, held that the time for an appeal commences from the date of the judgment or ruling and not as had been previously the practice from the date of which the judgment or ruling was perfected by the sealing of the

Order. The reasons for our decision were that it would provide greater certainty to all parties and avoid confusion.

[17] In my judgment, in this age of computers and the internet when all judgments and rulings are readily available to lawyers on the internet, the reasons which persuaded the English Court of Appeal to extend the time in *Gatti v. Shoosmith* can no longer be used by practitioners to explain delay.

[18] All that said, the question remains whether I should grant the extension requested by the applicants. I have decided to do so subject to an order for costs because in my view it is desirable that the Full Court should consider whether *Foss v. Harbottle and Ashbury Railway Carriage and Iron Company v. Riche* should still be followed in Fiji.

[19] In *Edwards v. Halliwell (1950)2.ALL.E.R 1064 at p 1066* in a very concise statement of the law Jenkins,L.J said :

"The rule in *Foss v. Harbottle* as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then **cadit *quaestio***".

[20] The rule in *Foss v. Harbottle* has been vigorously criticized by commentators over the years particularly in England and the question of its reform was referred to the Law Commission in 1996. A useful discussion on this can be found in Gower's Principles of Modern Company Law 6th Edition at pp 676 to 678. In my opinion these questions warrant consideration by the Court of Appeal.

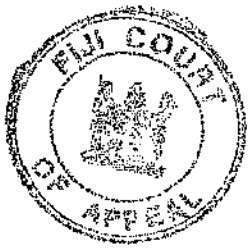
[21] The second case which I have mentioned and on which Hickie J relied was *Ashbury Railway Carriage and Iron Company v. Riche* in which the House of Lords held that if a company, incorporated by or under a statute acted beyond the scope of the objects stated in the statute or in its Memorandum of Association, such acts were void as beyond the company's capacity even if ratified by all the members.

[22] Hickie, J held that to bring themselves within the rule of Ashbury Railway Carriage and Iron Company the applicants had to be able to point to an act outside the memorandum of association which would be void ***ab initio*** and could not be ratified by the majority shareholders of the company. He held that the applicants had failed to point to such an act.

CONCLUSION

[23] In my judgment the questions of law raised in this application merit the consideration of the Full Court and I shall therefore grant leave to appeal out of time primarily because of the important questions of law involved.

[24] The applicants have succeeded on their summons although I consider the ruling of Hickie, J to be most persuasive. I therefore grant them leave to appeal on condition that they pay the respondents' costs of $1500.00 by the 27th of January 2010 and file Grounds of Appeal also by that date.



Dated at Suva this 20th day of January 2010.

JOHN E. BYRNE

PRESIDENT, FIJI COURT OF APPEAL