'ORIGINAL'

**IN THE COURT OF APPEAL**
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO: ABU 63 of 2014**
**(High Court HBC 111 of 2008)**

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| **BETWEEN** | : | **ANDREW SKERLEC (1-3)**<br>**UNION MANUFACTURING AND MARKETING COMPANY LIMITED (4)**<br>**SOMOSOMO DEVELOPMENTS LIMITED (5)** |
| | | ***Appellants*** |
| **AND** | : | **CHARLES DWIGHT TOMPKINS (1)**<br>**BARCLAY (PACIFIC) LIMITED (2)**<br>**TIDAL FLOWS LIMITED (3)**<br>**REGISTRAR OF TITLES (4)**<br>**REGISTRAR OF COMPANIES (5)**<br>**ATTORNEY-GENERAL OF FIJI (6)** |
| | | ***Respondents*** |

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| **Coram** | : | **Calanchini P** |
| **Counsel** | : | **Mr D Sharma for the Appellants**<br>**Mr R K Newton with Mr V Singh for the 2nd and 3rd Respondents** |
| **Date of Hearing** | : | **23 October 2015** |
| **Date of Judgment** | : | **3 December 2015** |

# JUDGMENT

[1] This is an application by the second and third Respondents, Barclay (Pacific) Limited and Tidal Flows Limited, for an order that the appeal filed by the Appellants be struck out.

[2] The first Respondent, Charles Dwight Tompkins, was not served with the appeal papers and as a result his name was ordered on 9 September 2015 to be removed from the appeal proceedings. Counsel for the fourth, fifth and sixth Respondents being the Registrar of Titles, the Registrar of Companies and the Attorney-General, was excused from further attendance at the hearing of the striking out application on the basis that those Respondents have no interest in the application and will abide the Court's decision.

[3] The application to strike out the appeal was made by summons filed on 23 January 2015 and was supported by an affidavit sworn on 23 January 2015 by Martha Smith. The application was opposed. The Appellants filed an answering affidavit sworn on 18 May 2015 by Alfred David Appleton. The parties filed written submissions prior to the hearing.

[4] The application is made under section 13 of the Court of Appeal Act Cap 12 (the Act) which so far as is relevant states:

> *"For all the purposes of and incidental to the hearing and determination of any appeal under this Part _ _ _ the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of court."*

[5] The application comes before a Justice of Appeal pursuant to section 20(1) (k) of the Act which provides that:

> *"20(1) A judge of the Court may exercise the following powers of the Court:*
>
> *(k) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal."*

[6] On 9 April 2008 the Appellants commenced proceedings in the High Court by way of Originating Summons. Some two years later the proceedings were by order of the Court converted into an action commenced by writ and on 13 July 2010 the Appellants delivered a Statement of Claim. A subsequent default judgment entered by the Appellants was set aside on 26 April 2012. A Defence was delivered and the pleadings were deemed to have closed by early July 2012.

[7] On 18 March 2013 the second and third Respondents filed in the High Court an application for an order, amongst others, that the claim he struck out under Order 18 Rule 18 of the High Court Rules. In a lengthy judgment delivered on 30 April 2014 and for the reasons stated in that judgment the learned High Court Judge concluded at paragraph 4.1:

> *"I find that the institution of these proceedings is an abuse of court process on the ground that the facts and issues raised herein and determined in civil action No.52 of 1994 are the same and that all issues in respect to transfer of shares in UMMC and SDL and Barclays mortgage were to be raised in the said Civil Action No.52 of 1994."*

[8] As a result the learned Judge ordered that the Appellants' claim be struck out with orders for costs in favour of the second to the sixth Respondents.

[9] Being dissatisfied with that decision the Appellants filed a notice of appeal on 25 August 2014 seeking amongst others an order from the Court of Appeal that the judgment of the High Court delivered on 30 April 2014 _ _ _ be wholly set aside or to be substituted by such other Order or Orders as the Court deems just and expedient. In the notice there were seven grounds of appeal upon which the Appellants relied in support their challenge.

[10] Whether there was compliance with Rule 16 of the Court of Appeal Rules (the Rules) concerning the time within which the notice of appeal was required to be served is a matter to which reference will be made later in the judgment. Putting that issue to one side, there was compliance with the requirements specified in Rule 17(1) of the Rules.

[11] It was not until 23 January 2015 that the second and third Respondents (hereafter referred to as the applicants) filed their summons seeking, amongst other orders, an order that the appeal be dismissed as incompetent. There is, however, no jurisdiction given to a justice of appeal under section 20(1) of the Act to dismiss an appeal on the application of a respondent. Consequently at the hearing and by consent the application was amended to read that the appeal be struck out as incompetent.

[12] The basis of the application to strike out the appeal is section 12 of the Act which states so far as is relevant:

> *"12(1) Subject to the provisions of subsection (2) an appeal shall lie under this Part in any cause or matter, not being a criminal proceedings, to the Court of Appeal:*
> *(a) - (b) _ _ _*
>
> *(2) No appeal shall lie:*
>
> *(a) - (e) _ _ _*
> *(f) without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court except [none of which apply]"*

[13] The effect of the section is clear. There is no right to appeal to the Court of Appeal an interlocutory judgment of the High Court without leave having first been granted by either the judge in the Court below or by the Court of Appeal.

[14] The applicants submitted that the decision of the learned High Court delivered on 30 April 2014 was an interlocutory judgment and that since the Appellants had filed a notice of appeal without first having obtained leave, the Court of Appeal had no jurisdiction to hear the appeal which should be struck out as being incompetent.

[15] In some cases when such an issue has been raised during the course of the hearing of a civil appeal before the Full Court of Appeal, this Court has indicated a willingness to grant ex tempore leave to enable the merits to be argued. Due to the absence of the fourth, fifth and sixth Respondents and because Counsel for the applicants indicated that leave would be strenuously opposed, I indicated that the only issue to be

determined on the summons was whether the appeal was from an interlocutory or a final judgment of the High Court.

[16] Amongst the authorities relied upon by the applicants was the decision of this Court in **Goundar –v- Minister for Health** (AAU 75 of 2006; 9 July 2008). That decision remains undisturbed and is binding on me.

[17] The position is clearly stated in paragraph 37 and 38 of the unreported version of that judgment:

> *"37.This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.*
>
> *38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal that ruling, order or declaration."*

[18] On the basis of that decision I have no hesitation in concluding that a judgment handed down on an application to strike out a pleading or claim under Order 18 Rule 18 of the High Court Rules is an interlocutory order.

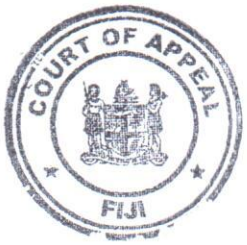
[19] As a result I have concluded that the judgment delivered on 30 April 2014 was an interlocutory judgment. There was no final hearing. The hearing was to determine an interlocutory application. Therefore leave was required under section 12(2) (f) of the Act. Without leave the Court of Appeal has no jurisdiction to determine the appeal which must be struck out. In the final analysis Counsel for the Appellants found it difficult to resist this conclusion.

[20] Finally, as an appeal against an interlocutory judgment, the Appellants were required to file and serve the application for leave within 21 days from the date of the judgment under Rule 16 of the Rules. The notice of appeal had been served within the 42 days that applied for an appeal against a final judgment but outside the 21 days that applied to an appeal against an interlocutory judgment.

[21] The applicants are successful and are entitled to costs which are fixed summarily in the sum of $1,800.00 to be paid within 21 days from the date of this judgment.

***Order:***

1. *Appeal is struck out.*
2. *Appellants to pay to the applicants costs of $1,800.00 within 21 days.*




W. Calanchini

**Hon. Mr Justice W.D. Calanchini**
**PRESIDENT, COURT OF APPEAL**