IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 27 OF 2016

BETWEEN	:	**KENTO (FIJI) LIMITED** PLAINTIFF/APPLICANT
AND	:	**NAOBEKA INVESTMENT LIMITED** 1ST DEFENDANT/RESPONDENT
AND	:	**SOUTH SEA CRUISES LIMITED** 2ND DEFENDANT/RESPONDENT
AND	:	**ITAUKEI LAND TRUST BOARD** 3RD DEFENDANT/RESPONDENT
AND	:	**MATAQALI NAOBEKA** 4TH DEFENDANT/RESPONDENT
Counsel	:	Mr. S. Inoke for the Plaintiff/Applicant.
	:	Mr. I. Tikoca for the 1st & 4th Defendants/Respondents.
	:	Ms. Tabuadua for the 2nd Defendant/Respondent.
	:	Mr. T. Duanasali for the 3rd Defendant/Respondent.
Written Submissions by	:	Plaintiff/Applicant; 1st, 2nd & 4th Defendants/Respondents on the 9th November.
Date of Hearing	:	9th November, 2017
Date of Ruling	:	23rd February, 2018
Ruling by	:	Justice Mr. Mohamed Mackie

R U L I N G

A. Introduction:

1. This ruling pertains to the hearing held before me on 9th November, 2017 in relation to the application filed by the Solicitors for the Plaintiff – Applicant (Applicant) supported by the affidavit of MICHAEL CLOWES, (M.C) a Director of the plaintiff Company, seeking extension of time for leave to appeal against an order of the Learned Master (Master) coupled with leave to appeal from the same and stay.

2. The Master on 18th November, 2016 has made the impugned order on two separate applications made by the 1st Defendant-Respondent (1st Respondent)and the 4th Defendant –Respondents (4th Respondents) on 21st March , 2016 and 22nd April,2016 respectively under Order 18 Rule 18 of the High Court Rules and in the inherent jurisdiction of the Court , moving to strike out the action against them . Master's ruling at its end states as follows;

   (1) The Plaintiff's writ of Summons and Statement of Claim filed against the First and Fourth Defendant is struck out.

   (2) The plaintiff to pay costs of $500.00 (summarily assessed) to the First and Fourth Defendants within 14 days hereof.

3. It is against the above ruling dated 18th November, 2016 made by then Master, Mr Jude Nanayakkara, (presently Hon. Judge) the applicant has preferred this application on 15th of December, 2016 moving for enlargement of time to appeal, leave to appeal and stay.

B. The Background facts in brief :

4. The Statement of claim filed by the Plaintiff on 16th February,2016 states , among other things, that;

   a. On 22nd August 2007, the 1st Defendant (as lessee) and 3rd Defendant (as lessor) signed an agreement for the lease of Malamala Island for a term of 99 years commencing from 1st day of July 2007 as the head lease.

   b. In about August, 2007 the 1st Defendant (as the sub lessor) and the plaintiff (as the sub lessee) signed an agreement for the sub lease of Malamala Island for a term of 25 years commencing from 1st day of August 2007.

   c. The plaintiff paid for and otherwise assisted the 1st and 4th Defendants in obtaining the issue of the head and the sub leases and it began the operations in the land in question on 3rd August, 2007.

d. On various dates in 2011 and 2012 the 1st Defendant purported to terminate the Plaintiff's sub lease for alleged breaches of it and despite the unlawfulness of the purported termination and filing of a Civil action bearing No: - HBC-100 of 2012, by the Plaintiff, the 1st Defendant purported to issue another sublease to the 2nd Defendant in the year 2015 for the same land.

e. Accordingly, the Plaintiff prayed, inter-alia, for a declaration that the purported termination of the sub lease is unlawful, with no effect and for special, general and aggravated damages.

5. The 2nd and 3rd respondents filed the statement of defence, while the 1st and the 4th Respondents filed their separate striking out applications under O.18, r.18, which resulted in the impugned ruling made 18th November, 2016.

C. The Law & Analysis :

6. It is to be observed that the aforesaid Civil action bearing No: - HBC-100 of 2012 (in paragraph 4.d above) filed by the applicant hereof against the 1st and 3rd respondents in this action and the Registrar of title, has survived two separate unsuccessful striking out attempts made by the 1st respondent in the years 2013 and 2017 under Order 18 Rule 18 of High Court Rules 1988.

7. The cause of action relied upon by the applicant in this action bearing No: HBC-27 of 2016 is said to be the alleged cancellation of the sub lease by the 1st Respondent. The reason adduced by the 1st respondent for the, admitted, cancellation of the sub lease is said to be the alleged violation of certain conditions in the sub lease agreement and, particularly, failure to obtain the "Foreign Investment Certificate" **(FIC)** by the applicant under the Foreign Investment Act No: 01 of 1999.

8. The alleged failure to obtain a **(FIC)** by the applicant for its extended activities in the land in question has been used as the main ammunition by the 1st respondent in its both striking out attempts in the Action No:-100 of 2012 as well. However, the alleged failure to obtain such a FIC had not influenced the both the Masters(Mr. T. Rajasinghe & Mr. Mohammed Azhar) for them to strike out the said action and those striking out applications now stand dismissed without any appeal being made by the 1st respondent

9. In this action bearing No: - HBC 27/2016 too, the alleged failure to obtain a FIC by the applicant has been the main ground adduced by the 1st respondent for the

striking out and it seems to have influenced the then learned Master Mr Jude Nanayakkara to a greater extent in striking out this action.

10. Both the rulings in the said action No: - HBC 100 of 2012, the first one made by then Acting Master of this Court Mr T. Rajasinghe on 16th October, 2013 and the second one made by the present acting Master Mr Mohamed Azhar on 12th September 2017, dismissing the 1st respondent's aforesaid both striking out applications, are found annexed to the written submissions of the applicant and to that of the 2nd respondent.

11. I will reproduce bellow the relevant provisions that govern the subjects of Appeals , Time for Appeal, Extension of Time, Application for Leave to Appeal, Notice of Appeal in relation to the orders and judgments by the Master, found under Order 59 of the High Court Rules 1988, for clarity and easy reference.

Appeals from Master's decision (o.59, r.8)

8. (1) *An appeal shall lie from the final order or judgment of the Master to a single judge of the High Court.*

(2) *No appeal shall lie from the interlocutory order or judgment of the Master to a single judge of the High Court without the leave of the single judge of the High court which may be granted or refused upon the papers filed.*

Time for appealing O.59, r.9)

9. *An appeal from an order or judgment of the Master shall be filed and served within the following period -*

a. 21 days from the date of delivery of an order or judgment; or
b. In case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

Extension of Time (O.59, r.10)

10 (1). *An Application to enlarge the time period for filing and serving a notice of appeal or cross- appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*

(2). *An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit*

Application for Leave to appeal (O.59, r.11

11. *Any application for leave to appeal an interlocutory order or judgment* ***shall*** be made *by summons with a supporting affidavit,* ***filed and served within 14 days*** *of the delivery of the order or the judgment. (Emphasis mine)*

Notice of appeal (O.59, r.12)

12. *An appeal shall be brought by way of a notice of appeal, which may be given in respect of the whole or any specified part of the order or judgment of the Master.*

12. On careful perusal of the above provisions, in the light of the wealthy case law authorities pertaining to the subject, the followings can be observed as to what the legislature has intended to achieve by the above provisions in High Court Rules of 1988.

   a. That under rule 10 (1) above, what is permitted is only the enlargement of time period for filing and serving of the **notice of appeal or cross appeal,** on an application made to the Master before the expiration of 21 days' time period and to a single judge after the expiration of that period. This is in respect of final orders or judgments arrived at the end by going through the entire adjudication process.

   b. The above rule 10(1) does not cater to the interlocutory orders or judgments made by the Master, which needs the leave of the Court to appeal as prescribed by r.11 above and same has to be obtained **by filing and serving the leave to appeal application within 14 days from the delivery of such interlocutory order or judgment**.

   c. The legislature in its own Wisdom has not made any provision under this Order for the extension of time period to appeal an interlocutory order or judgment made by the Master. Extension of time by rule 10 is permitted only for the appeal and cross appeal against a final order or judgment.

d. By using the word "Shall", in addition to imposing the mandatory requirement of obtaining leave to appeal an interlocutory order or a judgment and that too required to be applied and served within 14 days as per r. 11 above, what the legislature has intended to achieve is to limit the influx of the number of appeals on every trivial matters, which could result in the abuse of process, delay and obstruction of the path of justice.

e. This does not necessarily mean that a person who is dissatisfied with an interlocutory order or judgment, which has brought the action to its finality causing substantial injustice, while he is having good arguable case on valid grounds , should always be deprived of his appellate right and the doors of the Court should be tightly closed for him for ever.

f. Any short coming or failure in the prosecution or defending an action, which does not amount to cause substantial prejudice, hardship or irreparable damage to the opponent and if such failure is so trivial it should not stand on the way for justice.

g. There is no any explicit provision under Order 59 or elsewhere in the HCR to the effect that the applications for leave to appeal an interlocutory ruling or judgment, not filed and served within 14 days as stipulated above, shall necessarily be rejected. For the deserving cases always there should be a way for relief, provided the facts and law involved demand it.

h. The reasons behind the above restrictions, as I can understand, are that if a provision is readily made available under order 59 for all the interlocutory orders and judgments too to be appealed without leave being obtained and allowed to come in without being subjected to any time bar, the litigation is bound to be a never ending process and to consume scarcely available resources.

i. This also does not mean that a person, who has duly complied with the requirement of filing and serving his leave to appeal papers on an interlocutory order or judgment as prescribed by the rules above, automatically becomes entitled to knock the doors of the appellate Court. Apart from timely filing and serving the application, he has to pass the threshold test, where his entitlement to appeal is subjected to scrutiny, by examining his proposed grounds of appeal.

j. At the same time, a person who is dissatisfied with the impugned interlocutory order or judgment, that brings the action to termination, and if he has sufficient grounds to argue his case at appeal he should not be deprived of his right to appeal just because he has failed to adhere to the relevant rules in filing and serving the application due to reasons beyond his control or on any other technical issues, provided the opposite party is not seriously prejudiced.

k. In order to address this the Legislature, acting far-sightedly, has provided an alternative by making provisions under O.3, r.4 of the HCR to extend or abridge the required or authorised time period which stipulates as follows.

> *O.3, rr.4 (1). The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules , or by any judgment , order or direction, to do any act in any proceedings.*

l. In addition to the above provisions in the HCR of 1988, our case law authorities on the subject of enlargement of time for appeal and leave to appeal out of time are in abundance ,some of which I will quote in this ruling as an when needed.

Enlargement of Time for leave to Appeal:-

13. There is no dispute among the parties that the impugned ruling made by the Master on 18th November, 2016 in this action is an interlocutory order and the proper way of pursuing an appeal is by way of an application for leave to appeal.

14. The application before me, according to the Summons, has been made in terms of O.59, rr. 10 and 11 of the High Court Rules of 1988 and in the inherent jurisdiction of Court. Subsequently, the learned Counsel for the applicant (applicant's Counsel), at the hearing and in the written submissions has included the provisions found under O. 3, r. 4 and O. 59, r .16,(2) as well for the relief.

15. The impugned ruling in this matter was made on 18th November, 2016. The last date for the timely filing of leave to appeal application was 2nd December, 2016. But the same was filed only on 15th December, 2016, after 13 days. The service also said to have been effected after a 52 days.

Is the Delay Excusable? What are the considerations for extension of time?

16. Clearly, the applicant has failed to comply with Order 59 rule 11. In any given case, once the rules are not complied with, it becomes a matter of discretion for the court whether or not to grant leave to appeal out of time. The onus falls heavily on an intended appellant to convince the court to grant leave.

In ***Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 020 of 2009 (3 February 2010)*** the court the Fiji Court of Appeal stated:-

> *"It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal"*

17. The above passage suggests that a party's right of appeal exists while time runs for the filing of the requisite appeal documents. Once time runs out, that right is extinguished. It then becomes a matter of judicial discretion whether or not to grant leave to appeal out of time. That discretion must still be exercised judicially.

18. The provision made under Order 59 rule 10 of High Court Rule is for the extension of time for appeal and cross appeal and, admittedly, does not cover the interlocutory orders or judgments of the Master. It grants the Court a general discretion in a matter of extension of time and has not laid out the considerations, but the sub rule says that such applications should be supported by an affidavit. This indicate that when an extension is sought some facts relating to the reason for delay needs to be elicited by the applicant.

19. Though, the ruling in question does not fall under O.59, r.10 for the consideration of extension of time, the Court acting in the interest of justice, is at liberty to use its discretion to consider the application falling under O.3, r4, of the HCR and under inherent jurisdiction.

20. In ***Norwich and Peterborough Building Society v Steed [1991] 2 All ER 880 at 882*** it was held;

> *"The matters which this Court takes into account in deciding whether to grant an extension of time are: **first,** the length of the delay; **secondly,** the reasons for the delay; **thirdly,** the chances of the appeal succeeding if the application is granted; and, **fourthly,***

the degree of prejudice to the respondent if the application is granted."

The above mentioned judgment was applied in Fiji Supreme Court in ***Charan v Wati [2014] FJSC 19; CBV0007.2014 (17 December 2014),*** (unreported), (Gates CJ).

21. The case law authorities are in abundance where the Courts of Appeal in Fiji have opined that it is expedient to consider the following factors when the Court is called upon decide on an application for the enlargement of time. They are as follows.

    (i) The reason for the failure to file within time.

    (ii) The length of the delay.

    (iii) Whether there is a ground of merit justifying the appellate court's consideration.

    (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

    (v) If time is enlarged, will the Respondent be unfairly prejudiced?'

Reasons for failure to file within time and length of time

22. I shall reproduce bellow the relevant part of paragraph (3) in the affidavit of Michael Clowes, a Director of the applicant Company, which appears to have been sworn and signed in Queensland, Australia according to the engraved seal on it, on 6th December 2016 and filed for this purpose in this Court on 15th December, 2016.

    3."*.......The reason for seeking more time is that I live in Brisbane, Australia and manage a very large construction and Manufacturing Company and this is a very busy time of the year which requires a lot of time here in Brisbane and interstate ,often on very short notice. It is difficult to have papers signed before a Notary Public and posted to Fiji in time unless I am given reasonable amount of time, say two weeks at least. It would take at least a week to have my affidavit drafted , and an appointment made to attend before a Notary Public to have it executed and couriered to Fiji , the later taking up to five working days at times and could be worse now that this is a busy Christmas period* "

23. In response to the above reason adduced in M.C's affidavit, what the Chief Executive Officer of the 2nd respondent Company, namely, Mr. Nouzab Fareed, in paragraph 11 of his affidavit says, is that the accepted procedure by the Fiji Courts

is to accept an application with a copy of its supporting affidavit annexed to an affidavit of a member of the law firm acting and undertaking to file the original once in receipt of the same.

24. I agree that the above procedure is followed in our Courts. However, for it to be followed in this matter the affidavit in question should have been signed and ready before or at least on the 2nd December 2016 in order to abide by the 14 days dead line for filing and serving. The affidavit being signed only on 6th December 2016, the above suggested practice was impossible to be followed by the applicant. Even followed still he would have been out of the time limit.

25. The fact that the both the Directors of the applicant Company Mr & Mrs Clowes are Australian Citizens and they were there during the time material is not denied by the Nouzab's affidavit filed on behalf of the 1st respondent.

26. Again in paragraphs 13, 13 & 14 therein Nouzab states that there is no supporting evidence to verify or substantiate the excuses outlined in M.C's affidavit, delay is substantial and the applicant is responsible for prioritizing his own interest.

27. When the contents in paragraph 3 of M.C's affidavit are objectively considered, it appears that Mr Clowes has given the factual situation that was prevailing and he had to face during the time in question. His assertion that he manages very large construction and manufacturing Company has not been refuted by Nouzab's affidavit.

28. Substantiating the averments in paragraph 3 of M.C's affidavit by other supporting evidence would have been possible if the reason adduced by him was a specific incident or circumstance like illness, accident, hospitalization or travelling abroad etc.

29. The affidavit filed by Asiveni Lutumailagi on behalf of the 1st respondent Company neither sufficiently counter the contents of paragraph 3 in M.C's affidavit nor speaks about any possible prejudice to the 1st respondent.

30. In my view, expecting the strict compliance of the rules on time limit, in view of the circumstances averred by Michele Clowes, particularly, having to act from a foreign jurisdiction, is undesirable and showing some leniency using the discretion of the Court in extending the time limit would serve to achieve the ends of justice, provided he has good, convincing and arguable grounds for appeal. In my view, this will not prejudice the respondents.

Leave to Appeal against the Master's decision:
Whether there are merits on the Appeal?

31. As per decided authorities on this subject this is the primary decisive factor to be considered if the extension of time is to be granted. The weight given for this factor in the final determination of the extension is relatively high, though other factors are also considered. Even if there are good reasons for delay and no prejudice to the other party, if the appeal lacks merits no extension should be granted as it will only add additional costs and uncertainty to the parties. A person on some reason known to him, might deliberately delay in order to incur additional costs to the opposing side and abuse the process by delaying when the merits are lacking in an appeal. This is a concern when the merits are lacking in the proposed appeal, but not otherwise.

32. Following are the 5 grounds of advanced by the Applicant :

1. *The learned Master was wrong in law and in fact by hearing and determining the First and Fourth Defendants' strike out application when the issue on which that application was based, namely, the issue of Foreign Investment Certificate pursuant to the Foreign Investment Act 1999, was dealt with and determined in the related civil action HBC 100 of 2012 and therefore res judicata, contrary to the findings of the said civil action.*

2. *The learned Master failed to consider and address his mind at all or sufficiently to the fact the same issue had been dealt with and determined by this Honourable Court in civil action HBC 100 of 2012 despite the issue being drawn to his attention in the Appellant's supporting affidavit and submissions.*

3. *The learned Master was wrong in law and in fact in holding (at page 25 of the Ruling) that it was "illegal for the Plaintiff to take an Island in Fiji on sublease to carry on business in an activity, unless and until the Chief Executive of Investment Fiji issues the Plaintiff a Foreign Investment Certificate, which satisfies the terms of Section 8 of the Foreign Investment Act, No. 1 of 1999", for the following reasons:*

    a) Res judicata as in paragraph 1 above;

    b) *It was not open to the learned Master to make such a determination in a strike out application because such a determination could only be made after a full and proper trial as it required consideration of complex matters of law, such as the intention of the Parliament in enacting the said Act, its purpose and intent. It also required full and proper evidence obtained at trial after cross examination of witnesses, for example, of the*

executive and officers of the relevant authority, for such a determination to be made.

4. *The learned Master was wrong in law and in fact for finding (at page 33) that the Appellant's action was founded upon an agreement prohibited by Section 4 of the Foreign Investment Act and that the action arose "ex turpi causa" for the reasons given above.*

5. *The learned Master was wrong in law and in fact by summarily dismissing the Appellant's action contrary to principle for the reasons given above.*

33. As stated at the beginning of this ruling, the applicant hereof has another action bearing No: HBC-100/2012 pending against the 1st and 3rd respondents herein named. It is where the two separate striking out application against the applicant hereof has failed and the action is to proceed further.

34. The alleged failure by the applicant to obtain a foreign Investment Certificate, among other alleged violations by him, has been the main reason adduced by the 1st respondent in both the actions to justify the termination of the sub lease with the applicant and it is on the same ground the two striking out applications were moved in HBC-100/2012, which applications now stand dismissed.

35. However, the Master, who considered the striking out application in this action, has taken a different view on the question of the said Foreign Investment Certificate and proceeded to strike out the action while the issue on the FIC has remained as a decided matter by two former interlocutory rulings in HBC- 100 of 2012.

36. Accordingly, grounds of appeal the Applicant looks forward to advance in the proposed appeal on the question of *Res-Judicata* as stated in the above grounds of appeal appears to be convincing and arguable.

37. On perusal of the record I also find that the Sub Lease Agreement (SLA) between the applicant and the 1st respondent has not been a part of this record when the Master arrived at the decision to strike out this action against 1st and 4th respondents.

38. The pivotal question that should have caught the attention of the Master when he engaged in the process of deciding was, whether the obtaining of a FIC was a condition to be fulfilled by the Applicant according to the SLA. Then the question arises how the Master came to the conclusion that the sub lease in null and void and with no effect in the absence of SLA before him. Even if a condition of such nature

was available in SLA, the final decision on it should have been taken on the interpretation of the Foreign Investment Act No: 1 of 1999.

39. In my view, it is pertinent to make sure that the applicant has not been dealt with and/or punished by the Master in this action for , allegedly, not obtaining a FIC for his activities in Fiji, which is a task to be performed in terms of the Foreign Investment Act by following the due process therein.

40. I do not wish to say more on the merits as the threshold for merits for present applications contained in the proposed grounds of appeal are more than adequate to grant extension of time and also to grant leave to appeal.

<u>If the time is enlarged whether there will be prejudice</u>?

41. The only prejudice that was stated in the affidavit in opposition and written submission of the 2nd respondent was on cost. It is yet to be clarified whether the 2nd respondent could have taken part in this leave to appeal proceedings. The reason being there was no striking out application by the 2nd respondent. By the impugned ruling only the action against the 1st and 4th respondent was struck out and the action against 2nd and 3rd respondents stands. Making the 2nd and 3rd respondent as a party to this application could have been only for the purpose of giving notice of this interlocutory proceeding between the applicant and the 1st and 4th respondents. I am subject to correction on this point in the future hearing of the appeal.

42. It appears that the 2nd respondent has volunteered to actively take part in these proceedings while it was not required to and was made a respondent only to take notice of these proceedings. 2nd respondent could have remained as an observer like the 3rd respondent did in these proceedings. The applicant is bound to prosecute the action against the 2nd and 3rd respondents, which remains still alive and if it fails then the question of cost will arise to be decided at the appropriate stage. The cost is an inevitable consequence in the due process of law and cannot be a reason to deny a party's right to meritorious appeal.

43. The 1st and 4th Respondents had raised the issue of violation of Foreign Investment Act in the striking out application under O.18, R.18 of the High Court Rules of 1988. So, the respondents sought a final determination on the issue of FIC by High Court, as a preliminary matter. So, the due process of appeals and any subsequent applications are part and parcel of that determination which they sought, and they cannot complain of costs incurring due to the process they initiated. So extension of time cannot prejudice the 1st, 2nd and 4th respondents.

44. Application of the relevant law would indicate that if the leave is not granted the Plaintiff will not be able to claim for relief in the court of law and thus substantial injustice would occur. This should not happen when two materially different decisions stand on a similar issue, where one decision has decided the matter substantially. Though it is an interlocutory decision if the leave is refused there is substantial injustice not only to the Plaintiff but also other litigants, particularly to the foreign investors in Fiji. So, a determination on the matters mentioned above is a paramount consideration for the rights of the litigants in order to access justice.

D. Conclusion

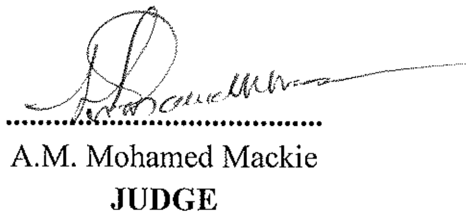
45. For the reasons adumbrated above, I am convinced that this is a fit and proper matter to grant extension of time for leave to appeal against the ruling of Master delivered on 18th November, 2016 and to allow filing of leave to appeal application. For the reasons stated above a decision for cost in favour of 2nd and 3rd respondent will not arise now. Decision for cost in favour of 1st and 4th respondents should remain reserved.

E. Final Orders

A. The Applicant is granted extension of time to file leave to appeal against the Master's decision of 18th November, 2016.

B. The leave to appeal is also granted against the impugned ruling of the Master made on 18th November, 2016.

C. No costs ordered in favour of the 2nd and 3rd respondents. Order for cost in favour of the 1st and 4th respondents reserved.



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A.M. Mohamed Mackie
JUDGE

At Lautoka
23rd February 2018